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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 358

HOOPESTON CANNING CO., E. PRITCHARD, INC., ET AL., APPELLANTS,

vs.

Thomas J. Cullen

~~LOUIS H. PINK~~, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, ALBANY COUNTY

FILED AUGUST 31, 1942.

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[fol. 1]

IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

HOOPESTON CANNING CO., a corporation, E. PRITCHARD, INC., a corporation, LANSING B. WARNER, Incorporated, a corporation, HARRY M. BROWN and JAMES T. SMITH, Plaintiffs,

HOOPESTON CANNING CO., a corporation, E. PRITCHARD, INC., a corporation, LANSING B. WARNER, Incorporated, a corporation, PAUL E. EMERSON and BEN A. MORTON, Plaintiffs,

v.

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York, Defendants

STATEMENT UNDER RULE 234

Under date of November 1, 1939, two actions praying for a declaratory judgment in each were commenced by the service of summonses and complaints. In one action the first above named plaintiffs were plaintiffs against the [fol. 2] above named defendants and in the other action the second above named plaintiffs were plaintiffs against the above named defendants. In each of the actions the defendants served an answer on or about December 22, 1939. The actions came on for trial before Mr. Justice Harry E. Schirick without a jury at a Trial Term in the City of Albany on the 26th and 27th days of March, 1940. At the opening of trial a motion was duly made and granted that the said actions be consolidated and an order has been entered to that effect. Mr. Justice Schirick rendered a written decision under date of December 10, 1940. Plaintiffs and defendants submitted requests to find and the judgment appealed from, which said requests to find and judgment were passed upon and signed by Mr. Justice Schirick under date of March 31, 1941. The declaratory judgment appealed from was entered in the Albany County Clerk's office on April 5, 1941.

The name of the original parties are as stated above and there has been no change of parties or attorneys since the commencement of the actions.

The plaintiffs in both actions have appealed from part of the declaratory judgment. The defendants have also appealed from part of the declaratory judgment. Both appeals are included herein.

[fol. 3] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

[Title omitted]

PLAINTIFFS' NOTICE OF APPEAL

[fol. 4] Please Take Notice, that Hoopeston Canning Co., a corporation, E. Pritchard, Inc., a corporation, Lansing B. Warner, Incorporated, a corporation, Harry M. Brown, James T. Smith, Paul E. Emerson and Ben A. Morton, the plaintiffs in the above named actions, heretofore consolidated, hereby appeal to the Appellate Division of the Supreme Court, for the Third Department, from those portions of the final judgment of the Supreme Court, entered herein in the office of the Clerk of Albany County on the 5th day of April, 1941, being the paragraphs of said final judgment numbered 5, 6, 7, 8, 11 and 13 which adjudge and decree that the parts of Section 40, Subsection 4, Section 413, Subsection 2, Section 415, Subsection 1 and 1-(d), Section 417, Subsection 1, Section 420 and Section 422, Subsection 1 of the Insurance Law of 1939, of the State of New York (Chapter 882 of the Laws of 1939, being Chapter 28 of the Consolidated Laws), alleged in the complaints in both actions, are valid and constitutional as against the plaintiffs and applicable to them, upon the law and upon the facts.

Dated this 5th day of April, 1941.

Wiswall, Walton, Wood & MacAffer, Attorneys for Plaintiffs-Appellants, Office & P. O. Address, 90 State Street, Albany, N. Y.

To: John J. Bennett, Jr., Esq., Attorney-General of New York, Attorney for Defendants-Respondents, Albany, New York. W. B. Clarke, Esq., Albany County Clerk.

[fol. 5] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

[Title omitted]

SUMMONS (BROWN ACTION)

To the Above Named Defendants:

You Are Hereby Summoned to answer the complaint in this action, and to serve a copy of your answer, or if the complaint is not served with this summons to serve a notice of appearance, on the plaintiffs' attorneys within twenty days after the service of this summons exclusive of the day of service. In case of your failure to appear or answer, Judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the County of Albany.

Dated, November 1, 1939.

Wiswall, Walton, Wood & MacAffer, Attorneys for Plaintiffs, Office & P. O. Address, 90 State Street, Albany, N. Y.

Zane, Trueblood & Johnson, Counsel, Office & P. O. Address, 1210 Harris Trust Building, Chicago, Illinois.

[fol. 6] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

COMPLAINT (BROWN ACTION)

The plaintiffs complaining of the defendants allege as follows:

1. That during all times hereinafter mentioned the plaintiff Hoopeston Canning Co. was, and continues so to be, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, with its principal place of business in the City of Hoopeston in said state; that the plaintiff, E. Pritchard, Inc., was, and continues so to be, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, with its principal place of business in the City of Bridgeton in said state; that the plaintiff Lansing B. Warner, Incorporated,

was, and continues so to be, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, having its office in the City of Chicago in said state; that the plaintiff Harry M. Brown is domiciled in, and a citizen and resident of, the State of New York, and that the plaintiff James T. Smith is domiciled in, and a citizen and resident of, the State of Pennsylvania.

2. That the defendants Louis H. Pink and John J. Bennett, Jr., are the duly acting and qualified Superintendent of Insurance and Attorney-General respectively, of the State of New York, and are sued in their official capacity.

[fol. 7] 3. That the plaintiffs Hoopeston Canning Co., E. Pritchard, Inc., Harry M. Brown and James T. Smith are representatives of approximately nine hundred seventy-six persons, firms and corporations, approximately ninety-three of whom are in New York, and all of whom have common interest herein, would be joined as parties plaintiff except that they are very numerous and that it is impracticable to bring them all before the court; and that therefore plaintiffs Hoopeston Canning Co., E. Pritchard, Inc., Harry M. Brown and James T. Smith sue for the benefit of all.

4. That said persons, firms and corporations, hereinafter sometimes designated as Subscribers, privately exchange contracts of inter-insurance among themselves, as both insured and insurer with several liability only, wherein they undertake privately to indemify each other against loss or damage by fire and similar hazards through the medium of the Attorney, plaintiff Lansing B. Warner, Incorporated, as attorney-in-fact appointed for the purpose by each Subscriber in a written Power of Attorney by such Subscriber, empowering the said Attorney to execute in the name of Canners Exchange Subscribers at Warner Inter-Insurance Bureau policies of insurance on his, their or its behalf. That at all times hereinafter alleged the aforesaid Canners Exchange Subscribers at Warner Inter-Insurance Bureau have been, and continue so to be, duly authorized by Certificate of Authority issued by the Director of Insurance of the State of Illinois, to exchange contracts of inter-insurance as herein alleged.

[fol. 8] 5. That a large proportion of the Subscribers now before the court began exchanging private contracts of inter-insurance, during the year 1907 through Lansing B. Warner as attorney-in-fact, under the designation of Subscribers at Canners Exchange, but during the year 1911 the plaintiff Lansing B. Warner, Incorporated was organized, and thereafter said Subscribers, together with others who have since become Subscribers, have continued through the agency of plaintiff Lansing B. Warner, Incorporated to exchange contracts of inter-insurance under the designation of Canners Exchange Subscribers at Warner Inter-Insurance Bureau. That said Lansing B. Warner throughout has continued to act as President of Lansing B. Warner, Incorporated.

6. That said Subscribers have not associated themselves together as an association, partnership, corporation, entity or other organization of any kind, and that the designation of Canners Exchange Subscribers at Warner Inter-Insurance Bureau is used solely for the purpose of identifying the persons, firms and corporations as Subscribers exchanging contracts of inter-insurance with each other as herein alleged, and also to identify the contracts of inter-insurance as hereinafter set out.

7. That the aforesaid Power of Attorney, a copy of which is hereto attached, marked "Exhibit A," and made a part hereof, contains the following provisions:

(a) The Attorney is authorized to exchange contracts of inter-insurance upon the property of canners and those engaged in allied fields among the Subscribers under the des-[fol. 9] ignation of Canners Exchange Subscribers at Warner Inter-Insurance Bureau; to receive deposits; to give and receive notices and adjust claims; to bring and defend suits at law or in equity; and to appoint an Agent in any state for the service of process and to perform such other acts as may be necessary.

(b) The consideration for the contract of inter-insurance is the exchange of promises of indemnity, and not the payment of a premium. The obligation of the Subscriber shall be a several, separate and individual liability and no policy providing for the joint liability of the Subscriber with any other Subscriber shall be executed.

(c) To secure his liability in the exchange of contracts, the Subscriber agrees to deposit with the Attorney a sum of money to be designated "Expense and Guarantee Fund."

In addition thereto the Subscriber agrees to deposit with the Attorney at Chicago the sum of ten dollars, to be designated "Reserve Fund," which may be increased to an average amount of two dollars per thousand of insurance carried by the Subscriber.

(d) For its compensation the Attorney shall be allowed a sum equal to twenty per cent of the Expense and Guarantee Fund due from each Subscriber, in return for which the Attorney agrees to pay all expenses in carrying out its duties, except certain enumerated expenses including the payment of losses.

(e) Each Expense and Guarantee Fund deposit shall be [fol. 10] divided into monthly parts based upon the relation the number of days in the month bears to the total number of days covered by the policy, which amounts, less expenses, including payment of losses, shall be credited to the subscriber as "surplus" in amount determined by the relation of the Reserve Fund of the Subscriber referable to insurance in force to the aggregate Reserve Funds of all Subscribers referable to all insurance in force. The proportion of losses and other expenses not otherwise provided for shall be paid out of said Surplus and then out of the Surplus Reserve hereinafter mentioned, if the Surplus is insufficient. The Reserve Fund of each Subscriber constitutes an additional source out of which said losses and expenses may be paid on the basis of said Subscriber's several, separate and individual liability.

(f) The liability of the Subscriber under the policy shall be only the proportionate share of the insurance granted under said policy as the Reserve Fund deposit of the Subscriber bears to the aggregate Reserve Fund deposits of all Subscribers. No policy shall be issued where the liability of the Subscriber on any one risk exceeds five times the amount of the Reserve Fund except where the property is not subject to loss from one cause.

(g) A fund designated "Surplus Reserve" is to be created as a separate account of the Subscriber by creating thereto at the end of each year twenty per cent of the Surplus of the Subscriber until the Surplus Reserve of the Subscriber is five times the Reserve Fund of the Subscriber and [fol. 11] the remainder of the Surplus is to be returned to the Subscriber.

(h) An Advisory Committee is created consisting of five members elected by the Subscribers annually, with the powers enumerated in the Power of Attorney, including the charge and keeping of all moneys and securities, less such sums as the Attorney is authorized to deduct. The Advisors shall have full discretion in regard to investments and safekeeping of moneys and securities, and two members of the committee shall sign checks approved by the Attorney. The remaining Advisors shall have the power to fill any vacancy that may occur in the committee.

(i) The contract of inter-insurance is issued at the office of the Attorney in the City of Chicago, State of Illinois, where it is made and performed.

8. That each and every provision of the aforesaid Power of Attorney is, in the exchange of contracts of inter-insurance among the Subscribers as herein alleged, carried out and fully performed by the Subscribers, Advisors and Attorney, and that the said Power of Attorney and the policy or contract of insurance hereinafter alleged are construed in accordance with the law of the State of Illinois. That it is essential to the successful operation of the plan upon which the system of inter-insurance herein described is based that the provisions of the Power of Attorney be uniform as to all Subscribers.

9. That the exchange of insurance or indemnity among Subscribers as herein alleged is accomplished by means of [fol. 12] contracts of inter-insurance executed on behalf of the Subscribers by the Attorney by signing the name "Canners Exchange Subscribers at Warner Inter-Insurance Bureau," and delivering the same to the Subscribers by mail sent from the office of the Attorney in Chicago; that the consideration for each contract of inter-insurance is not any premium or other sum paid; but solely the exchange of insurance; that said contracts of inter-insurance provide that the Subscribers are not jointly liable thereunder with other Subscribers, and that there is assumed by each Subscriber only a several, separate and individual liability for a proportionate share of the insurance granted thereunder in accordance with the provisions of the Power of Attorney; and that copies of said contracts of inter-insurance are attached hereto and marked "Exhibit B" and "Exhibit C," and made a part hereof.

10. That all Canners Exchange Subscribers at Warner Inter-Insurance Bureau are carefully selected on the basis of credit rating and general reputation for honesty. That because of these factors, as well as the efficient and economical management of the Attorney, insurance is made available at low cost to the Subscriber, and that by reason thereof the Subscribers were enabled to save during the year 1938 approximately nine hundred twenty-two thousand dollars over what their insurance would have cost if they had purchased it from companies engaged in the business of insurance. That the Subscribers now have liquid assets on deposit in accordance with the several Powers of Attorney in [fol. 13] an amount of more than four million dollars, almost all of which consists of cash in banks and United States government bonds, and that said Canners Exchange Subscribers at Warner Inter-Insurance Bureau have built up the highest reputation for fair dealing and the prompt payment of claims.

11. That the exchange of contracts of inter-insurance hereinabove alleged is confined strictly to the Subscribers herein alleged and constitutes purely private transactions among said Subscribers and is in no way affected with a public interest.

12. That the plan which the Subscribers under the designation of Canners Exchange Subscribers at Warner Inter-Insurance Bureau privately exchange contracts of insurance among themselves, as hereinabove alleged, is in substantial accord with Article 10, Chapter 28, of the Consolidated Laws of New York as amended, as construed by the Superintendent of Insurance of the State of New York, which for the past years has been, and still is, in force, and that said Canners Exchange Subscribers at Warner Inter-Insurance Bureau, having complied therewith, were on April 24, 1930, duly licensed as inter-insurers in said state, and that said license has been renewed from time to time. That said Canners Exchange Subscribers at Warner Inter-Insurance Bureau ever since their compliance with the aforesaid laws have, and continue so to be, licensed as inter-insurers in said state.

13. That prior to June 15, 1939, the State of New York enacted, to become law on said date, an Act in relation to [fol. 14] insurance corporations hereinafter referred to as

the Insurance Law of 1939, wherein and whereby Chapter 28 of the Consolidated Laws of New York as amended was repealed as of January 1, 1940, and that all matters appertaining to insurance within said state after January 1, 1940 will be governed by said Insurance Law of 1939; that said Canners Exchange Subscribers at Warner Inter-Insurance Bureau are desirous of qualifying under the valid provisions of the Insurance Law of 1939, and of securing a license thereunder from the defendant Louis H. Pink as Superintendent of Insurance in said state.

14. Plaintiffs allege upon information and belief that said Insurance Law of 1939 is illegal, invalid and inoperative as against the plaintiffs and the Subscribers exchanging contracts of inter-insurance under the designation of Canners Exchange Subscribers at Warner Inter-Insurance Bureau, as hereinbefore alleged, in the following respects, to wit:

(a) That part of section 130 which purports to require that foreign reciprocal insurers licensed in New York shall cause all contracts of inter-insurance exchanged outside of the State of New York covering property situated within the said state to be issued or effectuated through, or countersigned by, a resident licensed insurance agent of New York State.

(b) That part of section 168, subsection 2, which purports to provide as to foreign reciprocal insurers licensed in New York that no policy or contract of fire insurance, shall be made, issued or delivered by such insurers on any property [fol. 15] in the State of New York, unless it shall conform in all particulars to the "standard fire insurance policy of the State of New York" referred to in subsection 1 of said section 168.

(c) That part of section 410, subsection 1, which, as to foreign reciprocal insurers licensed in New York, purports to require that the term "Advisory Committee" shall include any official body, by whatever name called, chosen by the Subscribers, and which has, subject to the articles of association and power of attorney, ultimate power and responsibility in the management and control of the affairs of the reciprocal insurers.

(d) That part of section 412, subsection 1, which purports to require that no foreign reciprocal insurers licensed

in New York shall make any new agreement for insurance with any person, firm or corporation not having assets in an amount not less than ten thousand dollars in excess of liabilities, as shown by a report of a commercial agency having 100,000 subscribers, or by a sworn statement, and that before reviewing a contract of insurance with a Subscriber, similar proof of financial responsibility shall be required unless the Subscriber has accumulated and maintains a so-called Subscriber's operating reserve purported to be required by Section 418.

(e) That part of section 413, subsection 2, which purports to require all foreign reciprocal insurers licensed in New York, in relation to contracts of inter-insurance entered into both within and without the State of New York, to accumu- [fol. 16] late and maintain a special contingent surplus or guaranty surplus at the rate of one per cent of the insurers' net premium income for each year, until an amount is accumulated at least equal to the amount of minimum surplus required to be built up, to wit, two hundred fifty thousand dollars, without providing for the separate ownership thereof, thereby taking the separate property of the Subscriber and placing it in a common fund for the satisfaction of liabilities of other Subscribers. That said purported statute requires that the contingent surplus shall not be impaired or paid out by dividend, distributions or by returns of continuing or retiring Subscribers' reserves or deposits, except in the event of liquidation, and therefore imposes a joint liability upon each Subscriber with all other Subscribers for all losses and expenses to the extent of said purported contingent fund as aforesaid.

(f) That part of section 415, subsection 1, which purports to require that every Subscriber of all foreign reciprocal insurers licensed in New York shall execute and acknowledge a power of attorney in a manner sufficient for the acknowledgment of conveyances of real property to be recorded in the state in which the Subscriber is domiciled.

(g) That part of section 415, subsection 1 (d), which purports to require in reference to foreign reciprocal insurers licensed in New York that the power of attorney shall provide for an annual meeting of the Subscribers at which each Subscriber shall have power to vote in person or by proxy for all members of the Advisory Committee [fol. 17] to be chosen or appointed at such time.

(h) That part of section 417, subsection 1, which purports to require as to foreign reciprocal insurers licensed in New York, that every contract of insurance and every power of attorney under which contracts of insurance are issued or exchanged shall provide for a contingent several liability for assessment of the Subscriber as an inter-insurer on the risks of every other Subscriber in an amount of not less than one nor more than ten times the amount of and in addition to the annual premium expressed in such contract.

(i) That part of section 418, subsection 1, which, as to foreign reciprocal insurers licensed in New York, purports to require that every Subscriber shall be required to accumulate a minimum operating reserve by authorizing the attorney-in-fact to credit to the Subscriber an amount not less than one-quarter of such Subscriber's earnings as an underwriter, until such reserve is equal to the larger of the following amounts: (a) Twice the amount of the so-called annual-premium or premiums; or (b) the Subscriber's pro rata share, determined on the basis of the so-called annual premiums in force, of an aggregate operating reserve of one-half of one per cent of the aggregate amount of insurance in force.

(j) That part of section 418, subsection 3, which, as to foreign reciprocal insurers licensed in New York, purports to require that no Subscriber shall have a secured or preferred claim against the operating reserve which shall be [fol. 18] available for payment of claims of policyholders and creditors in preference to any claim for withdrawal. Thus the statute purports to make the liability of each Subscriber joint with that of all other Subscribers to the extent of the operating reserve.

(k) That part of section 420 which purports to require that all assets of foreign reciprocal insurers licensed in New York, including Subscribers' operating reserves, shall be liable primarily for payment of all liabilities incurred under their policies or other contracts, and that no part of the surplus funds of the said reciprocal insurers shall be subject to the claims of general creditors of any individual Subscriber until all policies under which any such Subscriber is obligated have been tereminated, and in no event beyond the amount of such Subscriber's operating reserve,

thereby purporting to impose joint liability upon each Subscriber with all other Subscribers to the extent of said assets. Said Section 420 also purports to require that surplus to policyholders be reported in the financial report to the state as, (1) Special contingent surplus; (2) Subscribers' operating reserves; (3) All other surplus, if any; and that those portions of the Insurance Law of 1939 which provide for the creation, building up and maintenance of the so-called special contingent surplus and Subscriber's operating reserves are palpably unconstitutional and void as hereinabove alleged.

(l) That part of section 421 which as to foreign reciprocal insurers licensed in New York purports to require that [fol. 19] each Subscriber's account be credited with premiums earned by him as an underwriter on the policies issued by the exchange, and charged with his proper share of all losses incurred under such policies as well as with the expenses incurred by the insurer.

(m) That part of section 422, subsection 1, which purports to require all foreign reciprocal insurers licensed in the State of New York to maintain at least one office in said state, and of section 40, subsection 4, which purports to require that every license issued by the State of New York to foreign reciprocal insurers shall state the principal place of business in the said state.

15. Plaintiffs allege upon information and belief that by reason of the facts and circumstances hereinbefore alleged, said enumerated portions of the Insurance Law of 1939, and each and every part thereof, as against the plaintiffs and each and every Subscriber exchanging contracts of inter-insurance under the designation of Canners Exchange Subscribers at Warner Inter-Insurance Bureau, violate the Articles of the Constitution of the State of New York, which articles in substance forbid the passage of any laws depriving any person of Liberty or property without due process of law, or denying to any person the equal protection of the laws, and violate the Articles of the Constitution of the United States, which articles in substance provide that the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states, and that no state shall make or enforce any law which shall [fol. 20] abridge the privileges or immunities of citizens of

the United States, nor deprive any person of liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, and are inoperative and void in that said alleged statutes purport to impose unreasonable, arbitrary and discriminatory regulations upon private contracts of inter-insurance entered into outside the State of New York, and purport to impose unreasonable, arbitrary and discriminatory regulations upon acts performed within the State of New York having solely to do with contracts of inter-insurance entered into outside of said state.

16. That the plan employed by the Subscribers in exchanging contracts of inter-insurance under the designation of Canners Exchange Subscribers at Warner Inter-Insurance Bureau, and the Attorney, has been carefully worked out over many years, and represents the best that has resulted from the combined wisdom and experience of the Subscribers, the Advisors, and the officers of the Attorney who have devoted their lives to the development of reciprocal or inter-insurance; that said plan has been developed to the point where, through the Power of Attorney, the contract of inter-insurance, and the methods employed by the Attorney, it now presents a delicately balanced system of self-insurance available to the comparative few who possess the qualifications, whereby the relations among the subscribers are truly reciprocal and whereby a high degree of co-ordination has been attained between the Subscribers and the Attorney, with the result that the optimum of [fol. 21] economy and efficiency have been reached and large savings, as aforesaid, have been returned uninterruptedly year after year to the Subscribers.

17. Plaintiffs allege upon information and belief that although section 414, subsection 2, of the aforesaid Insurance Law of 1939 allows to foreign reciprocal insurers licensed in New York one year from January 1, 1940, in which to revise their Power of Attorney to conform with said law, many provisions thereof, including portions of sections 130, 410-1, 412-1, 415-1, 417-1, 418-1, 420, 421, 422-2, and others, will on said date become prima facie applicable to plaintiffs and the Subscribers exchanging contracts of inter-insurance under the designation of Canners Exchange Subscribers at Warner Inter-Insurance Bureau, and subject them to certain enumerated penalties and to a suit for an

injunction by the defendant Louis H. Pink, as by section 34 provided, and thereby interfere with and dislocate their present plan of insurance so as to cause irreparable injury, and that therefore plaintiffs may not safely wait until said Insurance Law of 1939 becomes effective to bring this suit; that one of the deputies of the Superintendent of Insurance has stated to the representative of the plaintiff Lansing B. Warner, Incorporated, that the Superintendent of Insurance intends to enforce all of the provisions of the Insurance Law of 1939, as written, against the plaintiffs and the Subscribers exchanging contracts of inter-insurance under the designation of Canners Exchange Subscribers at Warner Inter-Insurance Bureau; and that a justiciable controversy [fol. 22] has arisen and now exists between plaintiffs and defendants as to whether the purported statutes hereinabove assigned are unconstitutional and void.

Wherefore, plaintiffs pray:

1. That a Declaratory Judgment be entered herein adjudging that those portions of the Insurance Law of 1939 alleged in paragraph 14 of this complaint are invalid, unconstitutional and void as against the plaintiffs and the Subscribers exchanging contracts of inter-insurance under the designation of Canners Exchange Subscribers at Warner Inter-Insurance Bureau.

2. That the defendants Louis H. Pink as Superintendent of Insurance of the State of New York, and John J. Bennett, Jr., as Attorney-General of the State of New York, and their successors in office and their employees, agents and attorneys be restrained from enforcing or attempting to enforce those portions of the Insurance Law of 1939 alleged in paragraph 14 of this complaint, in any manner whatsoever, against the plaintiffs and the Subscribers exchanging contracts of inter-insurance under the designation of Canners Exchange Subscribers at Warner Inter-Insurance Bureau.

3. That plaintiffs be awarded such other and further relief as may be equitable in the premises, including costs.

Wiswall, Walton, Wood & MacAffer, Attorneys for Plaintiffs, Office & P. O. Address, 90 State Street, Albany, N. Y.

Zane, Trueblood & Johnson, Counsel, Office & P. O. Address, 1210 Harris Trust Bldg., Chicago, Illinois.

[fol. 23] *Duly sworn to by Lansing B. Warner. Jurat omitted in printing.*

NOTE: Exhibits A, B and C annexed to the foregoing complaint are identical with Plaintiffs' Exhibits 6, 9, 10, respectively, which said plaintiff's exhibits are separately submitted on this appeal.

[fol. 24] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

ANSWER (BROWN ACTION)

The defendants above named, answering the complaint in the above entitled action:

First: Admit the allegations contained in the paragraph of said complaint numbered 2.

Second: Deny knowledge or information thereof sufficient to form a belief as to the allegations contained in the paragraphs of said complaint numbered 1, 3, 4, 5, 10 and 16.

Third: Deny each and every allegation contained in the paragraphs of said complaint numbered 11, 14, subparagraphs (a) to (m) inclusive, and 15.

Fourth: Deny the allegations contained in paragraph numbered 6 of said complaint that the aggregation of subscribers or participants to the arrangement for inter-insurance or exchange of insurance contracts on the reciprocal plan through an attorney-in-fact is not an association of such subscribers or participants.

Fifth: Deny that the allegations set forth in paragraph numbered 7, subparagraphs (a) to (i) inclusive, of said complaint are the same provisions as those contained in plaintiffs' Exhibit A.

Sixth: Deny that the provisions of Chapter 882 of the Laws of 1939 prevent, hinder or deny to the plaintiffs the [fol. 25] promulgation and employment of a uniform power of attorney. Deny knowledge or information sufficient to

form a belief as to the other and remaining allegations contained in the paragraph of said complaint numbered 8.

Seventh: Admit that the copies of plaintiffs' Exhibits A, B and C, attached to said complaint, contain all the conditions, stipulations, covenants and agreements by and between the subscriber and the attorney.

Eighth: Admit that the Canners Exchange Subscribers at Warner Inter-Insurance Bureau is at present and has heretofore been licensed to do business in the State of New York.

Ninth: Admit that the Legislature of the State of New York for the year 1939, enacted Chapter 882 of the Laws of 1939, entitled "Insurance Law" to become effective January 1, 1940.

Tenth: Admit that the provisions of Chapter 882 of the Laws of 1939, will become effective January 1, 1940, and that the Superintendent of Insurance will be required to enforce the provisions of said Chapter at the time and in the manner therein provided. Deny that a justiciable controversy has arisen and now exists between the plaintiffs and defendants as to the legality and constitutionality of said Chapter 882 of the Laws of 1939 in so far as it may appertain to the plaintiffs herein.

Eleventh: Deny each and every other allegation in said complaint contained not heretofore expressly admitted or denied.

[fol. 26] Wherefore, defendants demand judgment dismissing plaintiffs' complaint, together with the costs and disbursements of this action.

John J. Bennett, Jr., Attorney-General of the State of New York, Attorney for the Defendants, The Capitol, Albany, N. Y.

(Verified by George H. Jamison, Deputy Superintendent of Insurance, on December 22, 1939 and by Vincent Kiebala, Assistant Attorney-General, on December 22, 1939.)

[fol. 27] In Supreme Court of New York, Albany County

[Title omitted]

Summons (Emerson Action)

To the Above Named Defendants:

You Are Hereby Summoned to answer the complaint in this action, and to serve a copy of your answer, or if the complaint is not served with this summons to serve a notice of appearance, on the plaintiffs' attorneys within twenty days after the service of this summons exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the County of Albany.

Dated, November 1, 1939.

Wiswall, Walton, Wood & MacAffer, Attorneys for Plaintiffs, Office & P. O. Address, 90 State Street, Albany, N. Y.

Zane, Trueblood & Johnson, counsel, Office & P. O. Address 1210 Harris Trust Building, Chicago, Illinois.

[fol. 28] In Supreme Court of New York, Albany County

Complaint (Emerson Action)

The plaintiffs complaining of the defendants allege as follows:

1. That during all times hereinafter mentioned the plaintiff Hoopeston Canning Co. was, and continues so to be, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, with its principal place of business in the City of Hoopeston in said state; that the plaintiff E. Pritchard, Inc., was, and continues so to be, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, with its principal place of business in the City of Bridgeton in said state; that the plaintiff Lansing B. Warner, Incorporated, was, and continues so to be, a corporation duly organized and existing under and by virtue of

the laws of the State of Illinois, having its office in the City of Chicago in said state; that the plaintiff Paul E. Emerson is domiciled in, and a citizen and resident of, the State of New York, and that the plaintiff Ben. A. Morton is domiciled in, and a citizen and resident of, the State of Tennessee.

2. That the defendants Louis H. Pink and John J. Bennett, Jr., are the duly acting and qualified Superintendent of Insurance and Attorney-General, respectively, of the State of New York, and are sued in their official capacity.

3. That the plaintiff Hoopeston Canning Co., E. Pritchard, Inc., Paul E. Emerson and Ben A. Morton are representative of approximately twenty-one hundred persons, [fol. 29] firms and corporations, approximately two hundred and thirty of whom are in the State of New York, and all of whom have common interest herein, would be joined as parties plaintiff except that they are very numerous and that it is impracticable to bring them all before the Court; and that therefor plaintiff Hoopeston Canning Co., E. Pritchard, Inc., Paul E Emerson and Ben. A. Morton sue for the benefit of all.

That said persons, firms and corporations, hereinafter sometimes designated as Subscribers, privately exchange contracts of inter-insurance among themselves, as both insured and insurer with several liability only, wherein they undertake privately to indemnify each other against loss or damage by fire and similar hazards through the medium of the Agent, plaintiff Lansing B. Warner, Incorporated, as attorney-in-fact appointed for the purpose by each Subscriber in a written Appointment of Agent by such Subscriber, empowering the said Agent to execute in the name of Warner Reciprocal Insurers policies of insurance on his, their or its behalf. That at all times hereinafter alleged the aforesaid Warner Reciprocal Insurers have been, and continue so to be, duly authorized by Certificate of Authority issued by the Director of Insurance of the State of Illinois, to exchange contracts of inter-insurance as herein alleged.

5. That a large proportion of the Subscribers hereinbefore alleged began exchanging private contracts of inter-insurance during the year 1912 through the agency of plaintiff Lansing B. Warner, Incorporated, under the designa-

[fol. 30] tion of Wholesale Grocery Subscribers at Warner Inter-Insurance Bureau, but on January 1, 1926, said designation was discontinued; and ever since said date substantially the same Subscribers, together with others who have since become Subscribers, have continued through the same Agent to exchange contracts of inter-insurance under the designation of Warner Reciprocal Insurers as aforesaid.

6. That said Subscribers have not associated themselves together as an association, partnership, corporation, entity or other organization of any kind, and that the designation of Warner Reciprocal Insurers is used solely for the purpose of identifying the persons, firms and corporations as Subscribers exchanging contracts of inter-insurance with each other as herein alleged, and also to identify the contracts of inter-insurance as hereinafter set out.

7. That the aforesaid Appointment of Agent, a copy of which is hereto attached, marked "Exhibit A," and made a part hereof, contains the following provisions:

(a) The exchange of contracts of inter-insurance is effected between the particular Subscriber and other Subscribers through the use of private reciprocal contracts executed by the Agent on behalf of the said Subscriber under the designation of Warner Reciprocal Insurers, the consideration therefor being solely the exchange of contracts and not the payments of any premium.

(b) The Agent is authorized to effect such exchange of contracts of inter-insurance, to give and receive notices and [fol. 31] to adjust, compromise and defend suits at law or in equity, to appoint an agent in any state or territory for the service of process, and to perform such other acts as may be necessary.

(c) Upon the Agent's request the Subscriber agrees to deposit with the Agent at Chicago a sum denominated "Guaranty Deposit," the amount of which is to be determined by the Agent in accordance with the risk, amount and term of insurance, said fund to be held and disposed of as by said Appointment of Agent provided, for the Subscriber, as the separate fund of the Subscriber, out of which his, their or its liability is to be paid to the extent thereof. The liability of each Subscriber is several, separate and not joint. To determine the Subscriber's liability resulting

from the exchange of insurance contracts, the "Guaranty Deposit" is divided into monthly parts, each one of which is known as the "Liability Factor" of the Subscriber for a given month, and the measure of the Subscriber's liability for losses and expenses for a particular month is determined on the basis of the ratio of the particular Subscriber's Liability Factor to that of the aggregated Liability Factors of all Subscribers for that month. No premium is paid by any Subscriber, nor does the particular Subscriber receive any premium from any other Subscriber. No insurance contract is to be made by the Agent in which the liability of the Subscriber in relation to any one risk exceeds an amount equal to the total of the Guaranty Deposits relating to contracts in force.

[fol. 32] (d) The Appointment of Agent provides that five "Advisors" are to be selected from the persons, firms and corporations who exchange contracts of inter-insurance under the designation of Warner Reciprocal Insurers, to exercise the authority and perform the duties prescribed thereby. In case of the disqualification, death, resignation, or refusal or inability to act of any Advisor, a new Advisor will be designated by the remaining Advisors. Meetings of the Advisors are to be held at the office of the Agent, either at regular intervals or on call.

(e) The Agent is to receive twenty per cent of each sum due from the Subscriber as a Guaranty Deposit, in return for which the Agent agrees to pay all expenses incident to the carrying out of the powers conferred, except certain enumerated expenses including payment of losses.

(f) After all claims and expenses for which the particular Subscriber is liable are paid out of the Guaranty Deposit, the credit balance, if any, is transferred to the Savings Account of the particular Subscriber from which, after payment of one-fifth thereof as additional compensation to the Agent, an amount not to exceed one-half of the credit balance will be set aside as a several and separate Reserve Fund to be held as additional security for the payment of liabilities of the Subscriber and the remainder returned to the Subscriber. The Reserve Fund of each individual Subscriber may not exceed an amount twice the average annual Guaranty Deposit of such Subscriber, but in practice this amount has been reduced to an amount one and one-half

[fol. 33] times said deposit. The unused portion of the Reserve Fund is returned to the Subscriber upon his ceasing to be a Subscriber.

(g) The contract of insurance is to be issued at the office of the Agent in the City of Chicago, State of Illinois, where it is to be made and performed.

8. That, in the exchange of contracts of inter-insurance among the Subscribers as herein alleged, each and every provision of the aforesaid Appointment of Agent is carried out and fully performed by the Subscribers, Advisors and Agent, and that the said Appointment of Agent and the contract of inter-insurance hereinafter alleged are construed in accordance with the law of the State of Illinois. That it is essential to the successful operation of the plan upon which the system of inter-insurance herein described is based that the provisions of the Appointment of Agent be uniform as to all Subscribers.

9. That the exchange of insurance or indemnity among Subscribers as herein alleged is accomplished by means of contracts of inter-insurance executed on behalf of the Subscribers by the Agent by signing the name "Warner Reciprocal Insurers" and delivering the same to the Subscribers by mail sent from the office of the Agent in Chicago; that the consideration for each contract of inter-insurance is not any premium or other sum paid, but solely the exchange of insurance; that said contracts of inter-insurance provide that the Subscribers are not jointly liable thereunder with other Subscribers, and that there is assumed by each Subscriber only a several separate and indi- [fol. 34] vidual liability for a proportionate share of the insurance granted thereunder in accordance with the provisions of the Appointment of Agent; and that copies of said contracts of inter-insurance are attached hereto and marked "Exhibit B" and "Exhibit C," and made a part hereof.

10. That all Warner Reciprocal Insurers are carefully selected on the basis of credit rating and general reputation for honesty. That because of these factors, as well as the efficient and economical management of the Agent, insurance is made available at low cost to the Subscriber, and that by reason thereof the Subscribers were enabled to save during the year 1938 approximately two hundred eighty-

six thousand dollars over what their insurance would have cost if they had purchased it from companies engaged in the business of insurance. That the Subscribers now have liquid assets on deposit in accordance with the several Appointments of Agent in an amount of nearly one and a half million dollars, almost all of which consists of cash in banks and United States Government bonds, and that said Warner Reciprocal Insurers have built up the highest reputation for fair dealing and prompt payment of claims.

11. That the exchange of contracts of inter-insurance hereinabove alleged is confined strictly to the Subscribers herein alleged and constitutes purely private transactions among said Subscribers and is in no way affected with a public interest.

[fol. 35] 12. That the plan upon which the Subscribers, under the designation of Warner Reciprocal Insurers, privately exchange contracts of inter-insurance among themselves, as hereinabove alleged, is in substantial accord with Article 10, Chapter 28 of the Consolidated Laws of New York, as amended, as construed by the Superintendent of Insurance of the State of New York, which for the past years has been, and still is, in force, and that said Warner Reciprocal Insurers, having complied therewith, were on April 24, 1930, duly licensed as inter-insurers in said state, and that said license has been renewed from time to time. That said Warner Reciprocal Insurers ever since the compliance with the aforesaid laws have, and continue so to be, licensed inter-insurers in said state.

13. That prior to June 15, 1939, the State of New York enacted, to become law on said date, an Act in relation to insurance corporations, hereinafter referred to as the Insurance Law of 1939, wherein and whereby Chapter 28 of the Consolidated Laws of New York as amended was repealed as of January 1, 1940, and that all matters appertaining to insurance within said state after January 1, 1940, will be governed by said Insurance Law of 1939; that said Warner Reciprocal Insurers are desirous of qualifying under the valid provisions of the Insurance Law of 1939 and of securing a license thereunder from the defendant Louis H. Pink as Superintendent of Insurance in said state.

14. Plaintiffs alleged upon information and belief that said Insurance Law of 1939 is illegal, invalid and inopera-

[fol. 36] tive as against the plaintiffs and the Subscribers exchanging contracts of inter-insurance under the designation of Warner Reciprocal Insurers, as hereinbefore alleged, in the following respects, to wit:

(a) That part of Section 130 which purports to require that foreign reciprocal insurers licensed in New York shall cause all contracts of inter-insurance exchanged outside of the State of New York covering property situated within the said state to be issued or effectuated through, or countersigned by, a resident licensed insurance agent of New York State.

(b) That part of section 168, subsection 2, which purports to provide as to foreign reciprocal insurers licensed in New York that no policy or contract of fire insurance, shall be made, issued or delivered by such insurers on any property in the State of New York, unless it shall conform in all particulars to the "standard fire insurance policy of the State of New York" referred to in subsection 1 of said section 168.

(c) That part of section 410, subsection 1, which, as to foreign reciprocal insurers licensed in New York, purports to require that the term "Advisory Committee" shall include any official body, by whatever name called, chosen by the Subscribers, and which has subject to the articles of association and power of attorney, ultimate power and responsibility in the management and control of the affairs of the reciprocal insurers.

[fol. 37] (d) That part of section 412, subsection 1, which purports to require that no foreign reciprocal insurers licensed in New York shall make any new agreement for insurance with any person, firm or corporation not having assets in an amount not less than ten thousand dollars in excess of liabilities, as shown by a report of a commercial agency having 100,000 subscribers, or by a sworn statement, and that before renewing a contract of insurance with a Subscriber, similar proof of financial responsibility shall be required unless the Subscribers has accumulated and maintains a so-called Subscriber's operating reserve purported to be required by section 418.

(e) That part of section 413, subsection 2, which purports to require all foreign reciprocal insurers licensed in

New York, in relation to contracts of inter-insurance entered into both within and without the state of New York, to accumulate and maintain a special contingent surplus or guaranty surplus at the rate of one per cent of the insurers' net premium income for each year, until an amount is accumulated at least equal to the amount of minimum surplus required to be built up, to wit, two hundred fifty thousand dollars, without providing for the separate ownership thereof, thereby taking the separate property of the Subscriber and placing it in a common fund for the satisfaction of liabilities of other Subscribers. That said purported statute requires that the contingent surplus shall not be impaired or paid out by dividend, distributions or by return of continuing or retiring Subscribers' reserves or deposits, except in the event of [fol. 38] liquidation, and therefore imposes a joint liability upon each Subscriber with all other Subscribers for all losses and expenses to the extent of said purported contingent fund as aforesaid.

(f) That part of section 415, subsection 1, which purports to require that every Subscriber of all foreign reciprocal insurers licensed in New York shall execute and acknowledge a power of attorney in a manner sufficient for the acknowledgment of conveyances of real property to be recorded in the state in which the Subscribers is domiciled.

(g) That part of section 415, subsection 1 (d), which purports to require in reference to foreign reciprocal insurers licensed in New York that the power of attorney shall provide for an annual meeting of the Subscribers at which each Subscriber shall have power to vote in person or by proxy for all members of the Advisory Committee to be chosen or appointed at such time, and that part of section 415, subsection 1 (e), which purports to require that the power of attorney shall include a provision empowering the Advisory Committee to make regulations for the control and custody of funds and investments.

(h) That part of section 417, subsection 1, which purports to require as to foreign reciprocal insurers licensed in New York, that every contract of insurance and every power of attorney under which contracts of insurance are issued or exchanged shall provide for a contingent several liability for assessment of the Subscriber as an

inter-insurer on the risks of every other Subscriber in an [fol. 39] amount of not less than one nor more than ten times the amount of and in addition to the annual premium expressed in such contract.

(i) That part of section 418, subsection 1, which, as to foreign reciprocal insurers licensed in New York, purports to require that every Subscriber shall be required to accumulate a minimum operating reserve by authorizing the attorney-in-fact to credit to the Subscriber an amount not less than one-quarter of such Subscribed's earnings as an underwriter, until such reserve is equal to the larger of the following amounts: (a) Twice the amount of the so-called annual premium or premiums; or (b) the Subscriber's pro rata share, determined on the basis of the so-called annual premiums in force, of an aggregate operating reserve of one-half of one per cent of the aggregate amount of insurance in force.

(j) That part of section 418, subsection 3, which, as to foreign reciprocal insurers licensed in New York, purports to require that no Subscriber shall have a secured or preferred claim against the operating reserve which shall be available for payment of claims of policyholders and creditors in preference to any claim for withdrawal. Thus the statute purports to make the liability of each Subscriber joint with that of all other Subscribers to the extent of the operating reserve.

(k) That part of section 429 which purports to require that all assets of foreign reciprocal insurers licensed in New York, including Subscribers' operating reserves, shall be liable primarily for payment of all liabilities incurred under their policies or other contracts, and that no part of [fol. 40] the surplus funds of the said reciprocal insurers shall be subject to the claims of general creditors of any individual Subscriber until all policies under which any such Subscriber is obligated have been terminated, and in no event beyond the amount of such Subscriber's operating reserve, thereby purporting to impose joint liability upon each Subscriber with all other Subscribers to the extent of said assets. Said Section 420 also purports to require that surplus to policyholders be reported in the financial report to the state as, (1) Special contingent surplus; (2) Subscribers' operating reserves; (3) All other surplus, if

any; and that those portions of the Insurance Law of 1939 which provide for the creation, building up and maintenance of the so-called special contingent surplus and Subscribers' operating reserves are palpably unconstitutional and void as hereinabove alleged.

(l) That part of section 421 which, as to foreign reciprocal insurers licensed in New York, purports to require that each Subscriber's account be credited with premiums earned by him as an underwriter on the policies issued by the exchanges, and charged with his proper share of all losses incurred under such policies as well as with the expenses incurred by the insurer.

(m) That part of section 422, subsection 1, which purports to require all foreign reciprocal insurers licensed in the state of New York to maintain at least one office in said state, and of section 40, subsection 4, which purports to require that every license issued by the state of New York to foreign reciprocal insurers shall state the principal place of business in the said state.

[fol. 41] 15. Plaintiffs allege upon information and belief that by reason of the facts and circumstances hereinbefore alleged, said enumerated portions of the Insurance Law of 1939, and each and every part thereof, as against the plaintiffs and each and every Subscriber exchanging contracts of inter-insurance under the designation of Warner Reciprocal Insurers, violate the Articles of the Constitution of the state of New York, which articles in substance forbid the passage of any laws depriving any person of liberty or property without due process of law, or denying to any person the equal protection of the laws, and violate the Articles of the Constitution of the United States, which articles in substance provide that the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states, and that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, and are inoperative and void in that said alleged statutes purport to impose unreasonable, arbitrary and discriminatory regulations upon private contracts of inter-insurance entered into outside the state of

New York, and purpose to impose unreasonable, arbitrary and discriminatory regulations upon acts performed within the state of New York having solely to do with contracts of inter-insurance entered into outside of said state.

16. That the plan employed by the Subscribers in exchanging contracts of inter-insurance under the designation of Warner Reciprocal Insurers, and the Agent, has [fol. 42] been carefully worked out over many years, and represents the best that has resulted from the combined wisdom and experience of the Subscribers, the Advisors, and the officers of the Agent who have devoted their lives to the development of reciprocal or inter-insurance; that said plan has been developed to the point where, through the Appointment of Agent, the contract of inter-insurance, and the methods employed by the Agent, it now presents a delicately balanced system of self-insurance available to the comparative few who possess the qualifications, whereby the relations among the Subscribers are truly reciprocal and whereby a high degree of coordination has been attained between the Subscribers and the Agent, with the result that the optimum of economy and efficiency have been reached and large savings, as aforesaid, have been returned uninterruptedly year after year to the Subscribers.

17. Plaintiffs allege upon information and belief that although section 414, subsection 2, of the aforesaid Insurance Law of 1939 allows to foreign reciprocal insurers licensed in New York one year from January 1, 1940, in which to revise their power of attorney to conform with said law, many provisions thereof, including portions of section 130, 410-1, 412-1, 415-1, 417-1, 418-1, 420, 421, 422-2, and others will on said date become prima facie applicable to plaintiffs and the Subscribers exchanging contracts of inter-insurance under the designation of Warner Reciprocal Insurers and subject them to certain enumerated penalties and to a suit for an injunction by the defendant Louis H. Pink, as by section 34 provided, and thereby interfere with and dislo- [fol. 43] cate their present plan of insurance so as to cause irreparable injury, and that therefore plaintiffs may not safely wait until said Insurance Law of 1939 becomes effective to bring this suit; that one of the deputies of the Superintendent of Insurance has stated to the representative of the plaintiff Lansing B. Warner, Incorporated, that

the Superintendent of Insurance intends to enforce all of the provisions of the Insurance Law of 1939, as written, against the plaintiffs and the Subscribers exchanging contracts of inter-insurance under the designation of Warner Reciprocal Insurers; and that a justiciable controversy has arisen and now exists between plaintiffs and defendants as to whether the purported statutes hereinabove assigned are unconstitutional and void.

Wherefore, plaintiffs pray:

1. That a Declaratory Judgment be entered herein adjudging that those portions of the Insurance Law of 1939 alleged in paragraph 14 of this complaint are invalid, unconstitutional and void as against the plaintiffs and the Subscribers exchanging contracts of inter-insurance under the designation of Warner Reciprocal Insurers.

2. That the defendants, Louis H. Pink as Superintendent of Insurance of the State of New York, and John J. Bennett, Jr., as Attorney-General of the State of New York, and their successors in office and their employees, agents and attorneys be restrained from enforcing or attempting to enforce those portions of the Insurance Law of 1939 alleged in paragraph 14 of this complaint, in any manner whatsoever, against the plaintiffs and the Subscribers exchanging contracts of inter-insurance under the designation of Warner Reciprocal Insurers.

[fol. 44] 3. The plaintiffs be awarded such other and further relief as may be equitable in the premises, including costs.

Wiswall, Walton, Wood & MacAffer, Attorneys for Plaintiffs, Office & P. O. Address, 90 State Street, Albany, N. Y.

Zane, Trueblood & Johnson, Counsel, Office & P. O. Address, 1210 Harris Trust Bldg., Chicago, Illinois.

Duly sworn to by Lansing B. Warner. Jurat omitted in printing.

NOTE: Exhibits A, B and C annexed to the foregoing complaint are identical with Plaintiffs' Exhibit 5, 7 and 8, respectively, which said plaintiffs' exhibits are separately submitted on this appeal.

[fol. 45] In Supreme Court of New York, Albany County

Answer (Emerson Action)

The defendants above named answering the complaint in the above entitled action:

First. Admit the allegations contained in the paragraph of said complaint numbered 2.

Second. Deny knowledge or information thereof sufficient to form a belief as to the allegations contained in the paragraphs of said complaint numbered 1, 3, 4, 5, 10 and 16.

Third. Deny each and every allegation contained in the paragraphs of said complaint numbered 11, 14, subparagraphs (a) to (m), inclusive, and 15.

Fourth. Deny that the aggregation of subscribers or participants to the arrangement for inter-insurance or exchange of insurance contracts on the reciprocal plan through an attorney-in-fact is not an association of such subscribers or participants.

Fifth. Deny that the allegations set forth in paragraph numbered 7, sub-paragraphs (a) to (g) inclusive, of said complaint are the same provisions as those contained in Plaintiffs' Exhibit "A" entitled Appointment of Agent.

Sixth. Deny that the provisions of Chapter 882 of the Laws of 1939 prevent, hinder or deny to the plaintiffs the promulgation and employment of a uniform Appointment of Agent. Deny knowledge or information sufficient to form a belief as to the other and remaining allegations contained in the paragraph of said complaint numbered 8.

[fol. 46] Seventh. Admit that the copies of the two policies marked Exhibits "A" and "B" attached to plaintiffs' complaint and referred to in paragraph numbered 9 of said complaint, contain all the conditions, stipulations, covenants and agreements by and between the subscriber and the agent. Deny that the copies of said policies do not provide for the payment of a premium or other consideration.

Eighth. Admit that the plaintiff Lansing B. Warner, Incorporated, under the description of Warner Reciprocal

Insurers, is at present and has heretofore been licensed to do business in the State of New York.

Ninth. Admit that the Legislature of the State of New York for the year 1939 enacted Chapter 882 of the Laws of 1939 entitled "Insurance Law," to become effective January 1, 1940.

Tenth. Admit that the provisions of Chapter 882 of the Laws of 1939 will become effective January 1, 1940, and that the Superintendent of Insurance will be required to enforce the provisions of said chapter at the time and in the manner therein provided. Deny that a justiciable controversy has arisen and now exists between the plaintiffs and defendants as to the legality and constitutionality of said Chapter 882 of the Laws of 1939, in so far as it may appertain to the plaintiffs herein.

Eleventh. Deny each and every other allegation in said complaint contained not heretofore expressly admitted, qualified or denied.

[fol. 47] Wherefore, defendants demand judgment dismissing plaintiffs' complaint, together with the costs and disbursements of this action.

John J. Bennett, Jr., Attorney-General of the State of New York, Attorney for the Defendants, The Capitol, Albany, N. Y.

Verified by George H. Jamison, Deputy Superintendent of Insurance, on December 22, 1939, and by Vincent Kiebala, Assistant Attorney-General, on December 22, 1939.

[fol. 48] In Supreme Court of New York, Albany County

Hoopeston Canning Co., a Corporation, E. Peitchard, Inc., a Corporation, Lansing B. Warner, Incorporated, a Corporation, Paul E. Emerson and Ben A. Morton, Plaintiffs,

against

Louis H. Pink as Superintendent of Insurance of the State of New York and John J. Bennett, Jr., as Attorney-General of the State of New York, Defendants

HOOPESTON CANNING CO., a Corporation, E. PRITCHARD, INC., a Corporation, Lansing B. Warner, Incorporated, a Corporation, Harry M. Brown and James T. Smith, Plaintiffs,

against

LOUIS H. PINK as Superintendent of Insurance of the State of New York and John J. Bennett, Jr., as Attorney-General of the State of New York, Defendants

Statement of Evidence

[fol. 49] APPEARANCES:

Wiswall, Walton, Wood and MacAffer, attorneys, Carl O. Olson, of counsel, for plaintiffs. Zane, Trueblood and Johnson, of counsel for plaintiffs, by Franklin D. Trueblood.

Hon. John J. Bennett, Jr., Attorney-General of the State of New York, Vincent Kiebala, Assistant Attorney-General, of counsel, for defendants.

The issues in the above entitled actions having duly come on for trial before Mr. Justice Schirick at the March, 1940, Trial Term of the Supreme Court held in and for the County of Albany at the County Court House in the City of Albany, New York, the following proceedings were thereupon had on March 26th and 27th, 1940:

STIPULATION FOR CONSOLIDATION OF ACTIONS

The Court: The Court admits Mr. Trueblood. Mr. Trueblood is from the State of Illinois and the Court admits him for the purpose of trying these actions in this court. Now, then, what does the record show about these two actions being tried together?

Mr. Olson: It is stipulated between the attorneys for plaintiffs and the attorney for defendants that the two actions be consolidated and that an order may be entered accordingly. If the Court please, there are certain facts which I understand will be stipulated and will materially shorten the testimony. These facts are not in dispute. A stipulation has been prepared and submitted to the Attorney-General and in the material parts the Attorney-General, [fol. 50] I understand, will stipulate to those facts. I will ask Mr. Trueblood to put the stipulation on the record.

The Court: Well, first tell me something about this case. Take this on the record, please.

Mr. Trueblood: These two cases as consolidated deal with the type of insurance known as reciprocal insurance which, briefly stated, is a means of insurance whereby the property owners and the insured among themselves assure their own risks. They exchange insurance. These are actions for a declaratory judgment. We are asking for a declaration that certain portions of the new New York Insurance Code passed in 1939, with which your Honor is familiar, be declared unconstitutional and void as against the plaintiffs.

Now, the plaintiffs, your Honor, consist of two groups of subscribers—in reciprocal insurance subscribers are the property owners and both the insured and the insurer—together with the attorney in fact who executes contracts of inter-insurance on behalf of the several subscribers. I will explain that a little more fully in a moment. An order of consolidation has been entered or will be entered and the proof on the two groups is virtually the same, with some minor differences. Now, these two groups, if the Court please, are groups of inter-insurers or subscribers, one of which is known under the name of Warner Reciprocal Insurers. That group is a body of approximately twenty-three hundred persons, firms and corporations scattered throughout the United States who are engaged in a fairly specialized type of business, which in the case of Warner [fol. 51] Reciprocal Insurers is the wholesale grocery business and allied lines. Now, the other group consists of approximately one thousand subscribers; it is the larger group in the point of view of outstanding insurance, and it refers only to the canning industry and allied lines. The proof will show that virtually every canner—representative canner—in the United States, including I believe ninety-three in the State of New York, is a member of this group or exchange.

It is as simple as A-B-C, your Honor. Each canner or each subscriber—now we are referring to the canners' group—executes what is known as a power of attorney, and there is nothing sui generis about this power of attorney at all. It is an ordinary power of attorney of which this is a copy. I won't go into detail now, but the proof will show it. The subscriber—the person, firm or corporation desiring this inter-insurance—signs an ordinary power of attorney which is known as the appointment of agent and by

mail forwards this power of attorney to the agent to whom it runs in Chicago. That agent is a corporation known as Lansing B. Warner, Incorporated. Lansing B. Warner is a gentleman who is now living in a state of semi-retirement and unfortunately cannot be here because of ill health that sent him to Pinehurst, North Carolina, to convalesce. Mr. Warner back in 1907 had been with stock insurance companies a good many years. He conceived this particular plan of the canning industry writing their own insurance and acting as personal agent for a small number of canners belonging to the National Canners' Association, including some of the New York members, he began this exchange of con- [fol. 52] tracts which became very popular, and in 1911 he organized the organization Lansing B. Warner, Incorporated. By that time he had included in the exchange virtually every representative canner in the United States. In 1912 Mr. Warner organized this second group of inter-insurers as I have stated, who are the persons, firms and corporations exchanging contracts under the name of Warner Reciprocal Insurers, which includes the wholesale grocery business and allied businesses.

Now, of course, the agent in Chicago is licensed under the Insurance Laws of the State of Illinois and under that license alone for many years exchanged contracts of inter-insurance pursuant to these powers of attorney throughout the country and it was not until 1930 that the Warner groups procured a license in New York State to do business as the license states in New York.

I should like to call your Honor's attention to this: That there is no doing of business in the normal sense of the word in New York state or any other state except Illinois because every one of these contracts of insurance—and here is the contract physically that is executed by the attorney in fact on behalf of each subscriber—there is no doing of business except in Illinois because every one of those contracts is and the invariable rule is that it must be made, executed and delivered in the State of Illinois, the last named being through the mails. In fact there is no authority in the power of attorney to do anything but execute that contract in Chicago and mail it to the subscriber, no matter where he resides.

[fol. 53] Now, the importance of that of course is apparent, because under that system neither the State of New

York nor the State of New Jersey nor the State of Delaware nor any other State where subscribers reside or has any jurisdiction under those, or rather over those contracts.

Now, a word about the financial side of this plan of exchanging contracts. There has never been (and the proof will so show) in thirty-two years of exchanging contracts a single instance where the slightest reflection has been cast upon the financial ability or integrity of these groups or of the agent, and in thirty-two years in New York State we have never been sued on a loss and, while I am not an insurance expert by any means, as I understand it our proportion of assets to liabilities or to risks is as large if not the largest of any insurers in the country. I may be mistaken but I believe that to be true. At any rate there is no doubt about, and I believe the Attorney-General will not in the slightest degree question, the honesty, the integrity, the financial ability to respond or the method of running of these exchange companies.

A liberal, equitable policy has been pursued in regard to losses. I say we have never been sued here, and all of our assets are either in cash in banks or in government bonds. We do not have five cents of doubtful or poor assets of any kind, but the theory of this is to maintain the assets entirely liquid.

On this matter of assets I neglected to explain that the modus operandi of these two plans as far as finances is concerned is this: A subscriber who wants to come in—I [fol. 54] should not say wants to come in—a subscriber who would like to exchange contracts executes a power of attorney. That power of attorney is sent by him to Chicago to the office of the agent. Thereupon a very thorough check is made of this potential subscriber; a credit report is run on him; his bank is investigated or interviewed; his loss history on fires is ascertained to the end that only a very few, relatively speaking, of the great mass of property owners are permitted to become subscribers. We will open the checking of this potential subscriber's credit and if the credit turns out satisfactorily a trained insurance engineer is sent out from Chicago to go over this property and advise with and collaborate with this new subscriber, to the end that the very minimum of risk is entailed in the exchange of his contract. The subscriber, when he receives the contract of inter-insurance through the mail, when he is accepted, is sent a statement showing the amount of

money that he will have to turn over as his deposit to pay for this insurance. Now, it is only a deposit, your Honor, because there can be no expense to the subscriber except the agent's operating expense which is fixed by the power of attorney at twenty per cent of the amount of deposit, out of which the agent pays all underwriting expenses, pays to maintain an office of one hundred and forty employees in Chicago and the twenty per cent also includes the compensation, other than the expenses, to the agent except certain excepted expenses which would include the losses and certain other items, counsel fees and a few other things like that. Then in addition the agent in the case of Warner [fol. 55] Reciprocal Insurers receives a fifth or twenty per cent bonus on the savings that it effects for the subscriber.

Now, there can be no price charged for this insurance because there can't be any premium. It is cost insurance. In practice the amount of deposit required runs virtually the same as the premium charged by the ordinary insurance carrier. The amount is determined by the agent, taking into consideration the factors of risk and size and things of that kind, and at the end of the year after all expenses have been determined, losses and everything else, the subscriber is sent a check for what is left of his own money, and that check he receives each year is known in reciprocal insurance as a saving. Now, the amount of money, as the proof will show, that has been saved to the residents and citizens of New York is surprising. It runs in the canners' group from forty to sixty per cent of the amount of that deposit which roughly speaking is about the same amount as a premium which would be charged by an old line company.

Now, the reason for that remarkable economy is simple, your Honor. There are two reasons. One is that we have no agency system whatsoever. The person who can qualify and who wants our insurance has got to write in and get it. Where the old line companies pay from twenty-five to forty per cent of the premium for agency expense we have none of that. We have no countersigning of policies within the State. There is no purpose for it. This is specialized insurance. We have a corps of trained engineers who have been reared in the insurance industry, who are college men [fol. 56] and who can at once look at a risk and see what it needs to cut down the hazard of fire, each of whom collaborates closely with the subscriber, and periodic inspections

occur, so that they perform a service that an insurance agent is not equipped to perform. There is no purpose in having a resident agent, and one of the statutes challenged here is Section 130 of the New York Insurance Code, which is a section that provides for countersigning of these policies by a resident agent. We say, your Honor, if this were an ordinary insurance business where a resident agent was sent out, say from Albany, and told to hunt up customers, you would have an entirely different thing. It is no such thing. I don't know but I think we have one or two risks in Albany but that is all. They are scattered. There are fewer than a hundred in the entire State. There is no city in New York State that has more than five subscribers in Canners Exchange and of course New York State is one of the great canning states of the country. Now, that is one factor. We carry no expensive resident agent or hierarchy of agency system and, secondly, we cooperate with the subscriber in keeping down the risks as I have stated. If a sprinkler system becomes necessary to put in to abate the risk, that sprinkler system goes in; if a fire wall needs to be constructed our trained engineer will work with the subscriber to see that that fire wall is put in, with the result that the losses of the Canners Exchange run only twenty to thirty per cent as against forty-five to fifty per cent in the regular insurance companies. We have no agents that can bind us with insurance contracts and there is no authority [fol. 57] for any one to enter into one of these contracts except in Chicago by the agent and, as I say, sent out by mail by the agent. These field representatives, these trained engineers, do nothing but service these contracts, and if any one in the vicinity wants one of these representatives to come and look at his property to see if he can qualify, why, naturally a field representative will go and survey it. That is part of his duty. But we do not have solicitors. We are not interested in solicitation and the fact is that in the canners group we have virtually the same subscribers today that Mr. Warner had back in 1909 and 1910 when the plan got under good operation. We have virtually the same New York subscribers today that we had then.

The assets of Canners Exchange has grown considerably. There are four and a half million dollars in liquid assets on deposit in the hands of the agent and the advis-

ors—there are several representative subscribers chosen to act in the capacity of supervision over the affairs of the agent—and as I say in the canners group they have about four and a half million dollars of government bonds and cash on hand and losses are paid out of that fund immediately. Another thing we don't have any extensive loss expenses as a rule because our subscribers are a select few of the highest repute and in the event of a loss it is usually a small loss and we take their proof of loss without murmur or question because we know that they are honest and we know that they are interested as a self-insurer in keeping down all losses to the very lowest point. We know that they will play fair with us and they know that we will [fol. 58] play fair with them. So we don't have that heavy loss that most insurers have.

And there are the two great outstanding reasons for the great economy of this plan of self-insurance that the citizens of this state have so readily embraced.

Now, let me say a word further about this deposit. The question arises: In the event of a loss by any one of these subscribers, what proportionate part of that loss does each subscriber bear? The answer to that question is that generally speaking while there are some ramifications in the power of attorney—I shan't go into them now—generally speaking the loss in the Warner Reciprocal group is stood in relation to the amount of deposit of that particular subscriber to the aggregate of the deposits. If there are five subscribers—let us suppose an elementary case—and the deposit of each subscriber is one hundred dollars, in the event of a loss each subscriber bears a one-fifth part. But what is all important in this reciprocal insurance and without which there can be no true reciprocal insurance is that there must not be any joint liability. Now, that is the very essence of this. In other words, no self-insurer will come in for a moment if he thinks that he may have to stand the whole of a loss. Naturally it would clean him out in short order. So that every document that is used almost in this plan of insurance contains an express injunction against anything that even in the remotest appertains to a joint liability. That subscriber responds, when there is a loss, in the proportion that his several individual deposit bears to the whole and he cannot be assessed a single cent beside that.

[fol. 59] Now, some of these New York statutes which we assign as unconstitutional impose a joint liability upon these groups and for that reason they are bad alone.

Now, a word about the legal side of this, your Honor, and we will have done. We allege in each suit that the statutes including the resident agent statute, including statutes that affect to change our internal structure and manner of operation in Illinois, statutes that require certain contingent funds and reserves built up so as to incur joint liability on the subscriber, and certain other statutes that purport to dictate how this exchange shall be operated in Chicago, are unconstitutional for the reasons centering around the due process clauses, causes, each one of them. Specifically speaking, mainly speaking, we charge that New York State is without authority to interfere with or regulate these contracts of inter-insurance that are executed and delivered in the State of Illinois, and that New York does not have any jurisdiction over these contracts. We believe that the authorities, both of your own Court of Appeals, the intermediate Appellate Courts of this state and the Supreme Court of the United States are unanimous in denouncing this very thing, and as recently as last week a three-judge Federal Court in the State of Montana held unconstitutional an attempt by the State of Montana to bring the contracts into the state and divide the commission that would normally be payable in large part at least to the producer of this stock insurance to the countersigning agent alone under the due process clause. That is the last authority on the subject. And in any plan of insurance, as [fol. 60] your Honor knows, but it is particularly applicable to reciprocal insurance, the true reciprocal insurance such as this is—and I might say that there are a scattering of suppositious insurers in America which are not true reciprocal insurers but are found to be nothing but reciprocal stock companies or hybridized insurance companies. The very corner stone of the Warner exchange of contracts is this: That we have the constitutional right to enter into these contracts in Illinois on the life or property or person of a citizen of New York and the State of New York can in no manner regulate, touch or affect those contracts. That was determined back in 1897 in the famous Algeier case in the Supreme Court, with which your Honor is familiar, where just that attempt was made and where it was de-

nounced. That case was followed by the famous St. Louis Cotton Compress case by Mr. Justice Holmes and the doctrine has been expounded by the Court of Appeals of New York and all other Appellate Courts. So that we have the constitutional right in Chicago to exchange contracts of inter-insurance on property in New York.

Now, I forgot to mention that all losses under the contract of inter-insurance and the power of attorney are paid in Chicago. There is no authority to pay losses out in the field. There is no authority to send anybody out and reach a compromise with a subscriber on a loss, because the power simply isn't there. The W. R. I. (that is our nickname for Warner Reciprocal Insurers) power of attorney specifically provides that the contract shall be performed as well as made in Chicago, and the Canners' power of attorney pro- [fol. 61] vides for the exchange and performance in Chicago. So that question is out. It is no question of doing any affirmative act in the State of New York. But then your New York authorities have uniformly denounced any attempts to regulate even acts in the State of New York performed in relation to contracts entered into outside of the state as the authorities we will submit in due order show.

Now, I think I have covered the ground pretty well. Oh, yes, I did want to mention two further points and that is that we have a license. That is, each group as I have stated is licensed in the State of New York. But the fact of that license is no warrant to the State of New York to annex any provision or qualification upon the granting of that license or the maintenance of a license by attaching a regulation that violates due process. Your Honor is perfectly familiar with that doctrine. It goes back to the famous Head case and the Dodge case. New York State, as I have said, is utterly powerless to annex any condition under our license which would violate the Federal Constitution. In 1935 New York promulgated a statute which enjoined or purported to enjoin upon us a payment of taxes measured by the risks in New York State and so far we have yielded to that statute although we never have thought that constitutional under some of the leading cases in the Supreme Court. We were not obliged to pay this tax but to date we have paid in round numbers about eighteen or nineteen thousand dollars to the State of New York for the privilege of these licenses

which we didn't use. We want to continue the licenses, [fol. 62] however, and solely for the benefit of the subscribers in New York State because under the license arrangement we have to have a power of attorney on file to enable us to be sued on a risk. The subscribers in New York State feel better about it, and although we have never in thirty-two years been sued here we don't want to run away from a case in the event one should be brought. We want to meet the subscriber, your citizen of New York, on his home ground, and we want that power of attorney on file here and we have been willing to pay for it so far. Then another thing is that it is of downright avail to show them our annual statements audited by the Insurance Department of the State of New York and it enables your local canner or wholesale grocer to come here in Albany or to go down to New York and look up our records under oath and approved by the Insurance Department of New York and see just what our condition of affairs is. We want everything spread out for the benefit of our subscribers. But aside from that we don't need any license in New York or any other state except Illinois. We exchanged as many contracts before we had this license in New York—in fact more for a while—and if we are forced to of course we will go back under the Algeier case and exchange contracts the way we did prior to 1930.

Now, I saved for last the very essence of the system of reciprocal insurance as it has been successfully practiced by the Warner groups for thirty-two years and that is that the rights of all subscribers must be and remain upon a strict parity. There can be no true reciprocal insurance if [fol. 63] one subscriber is charged with a greater liability than a subscriber across the state line. It throws the system out of balance and, as the proof will show, any such attempt to render ununiform the provisions of this power of attorney would ultimately work to the destruction of the plan. Now, it is inherent in the system of true reciprocal insurance, your Honor, that all contracts of inter-insurance, all documents prescribing the rights and duties of the departments, be construed according to the law of a particular state. It would be impossible to give contracts of inter-insurance forty-seven different constructions or forty-eight different constructions and maintain the plan. The office of the exchange is in Chicago, the contracts are

issued under the warrant of authority of the Illinois law, they are exchanged on property in New York with the Illinois statutes written into them, just the same as if they actually were written into them, and those contracts with those statutes are the terms and provisions under which these exchanges operate. Now, we cannot change that and the proof will show this. You cannot take those contracts if those issued in New York must accept and bear the burdens of the New York Statutes, those issued in Ohio must do the same and those issued in Montana must do the same, because, as Mr. Justice Butler points out in one of the leading Supreme Court cases, such a thing as that would result in inequalities, conflicting rights and claims and utter chaos. Therefore, these contracts cannot be brought into New York and countersigned because that subjects them to the New York law, that makes these contracts that effect [fol. 64] comparatively few in New York affect three thousand subscribers throughout the United States, because in the very nature of things they must fix and contain the same qualifications and requirements and rights and duties and corresponding obligations.

So that all of our contracts throughout the thirty-two years have issued from Chicago under the Illinois law, and the plan has proven eminently successful as begun and as nursed through the precarious years by Mr. Warner until it has assumed an unquestionable place in the insurance annals of America. And all we ask, your Honor, as a condition of remaining in this state is to go along as we have done, to give your residents and citizens here a fair deal, treat them liberally as we have done and operate an exchange without molestation, on tried principles as they have been worked out by the experience of Mr. Warner and his staff of men who have devoted their lives to reciprocal insurance. We must respectfully reject this attempt on the part of New York State on a code that is untried and untrue, that was written by a man, as I understand it, of virtually no experience in the business world but who has gained his experience principally from the halls of academic circles, to umpire our affairs and say what nearly three thousand persons, firms and corporations scattered throughout the land shall do. But I repeat we should like to, and hope we can, continue to stay in New York and continue to conduct our affairs as we have in the past. But if

we are forced to, we will have no alternative except to [fol. 65] withdraw. We cannot permit our plans of inter-insurance to be recreated and remade and doctored up by any particular state. We have satisfied the State of Illinois. The proof will show, I believe, great satisfaction from everybody. We have letters from leading corporations in the State of New York extolling the groups and expressing great satisfaction and pleasure in them, and all we ask is to be let alone and given our breath to continue and go on as we have in the past.

Mr. Kiebala: May it please the Court, I believe that the greater portion of what Mr. Trueblood said is a matter of proof. These are very fine facts and I hope he can sustain them on proof, but it seems to me the sole question here is whether these two sets of plaintiffs in the first action and the second action—I think we designate them by the Morton action and the Smith action—are engaged in the business of insurance in the State of New York, and if they are engaged in the business of insurance in the State of New York they must be subject to the provisions of this state. We have regulations for inter-insurers of the State of New York pertaining to reciprocals or inter-insurers. They have willingly submitted, and if a foreign corporation wishes to come into this state and engage in a similar business they must submit to those regulations or they cannot do business in this state. So my statement is very brief—that the plaintiffs are engaged in the insurance business in the State of New York and as such are subject to the provisions of the State of New York.

Mr. Trueblood: If the Court please, Mr. Kiebala and [fol. 66] ourselves have agreed upon certain facts. I should like permission to give them to the reporter.

The Court: All right. Have you agreed upon them, or do you say you are going to?

Mr. Trueblood: We have, I believe. I will read them and you can dissent if I trespass, Mr. Kiebala.

It is agreed by and between the attorneys for the parties hereto that the following facts may be used upon this trial, or any subsequent trials that may be had in these causes, with the same force and effect as if the facts stipulated were proven by competent witnesses: In the action in which Paul E. Emerson and Ben. A. Morton are individual plaintiffs it is agreed that paragraphs one and two of the com-

plaint be stipulated as true. It is further stipulated that the appointment of agent and the contracts marked Exhibits A, B and C contain the full contract except as to an additional condition attached to and made a part of the contracts of inter-insurance filed with the Superintendent of Insurance of the State of New York and reading as follows: "Any action or other proceedings to enforce the provisions of this policy may be brought against the attorney in fact for Warner Reciprocal Insurers as representing all of said subscribers, and each subscriber agrees to abide by the result of any suit or proceedings so brought as fixing the proportionate amount of his or their individual liability hereunder."

It is further agreed that all annual statements and reports of Warner Reciprocal Insurers filed with the Insurance Department of the State of New York and each and [fol. 67] every part thereof may be received in evidence.

It is further stipulated that the operations of Warner Reciprocal Insurers during the period that they have been licensed by the Superintendent of Insurance of the State of New York have been in substantial compliance with Article 10, Chapter 28 of the Consolidated Laws of the State of New York as said laws existed before the enactment of the present Insurance Code; that the Superintendent of Insurance of the State of New York has construed Section 130 of the New York Insurance Law of 1939 as applicable to Warner Reciprocal Insurers and Lansing B. Warner, Incorporated, and has announced his determination to enforce the same against said parties.

It is also stipulated and agreed by and between the parties as to the action in that Harry M. Brown and James T. Smith are individual plaintiffs, that paragraphs one and two of the complaint are true and that the power of attorney and contracts of inter-insurance designated Exhibits A, B and C alleged in said complaint are true, accurate and correct documents used by said plaintiffs in the exchange of insurance except that the following additional condition is attached to and made a part of the said contracts: "Any action or other proceedings to enforce the provisions of this policy may be brought against the attorney in fact for Canners Exchange Subscribers at Warner Inter-insurance Bureau as representing all of said subscribers, and each subscriber agrees to abide by the result

[fol. 68] of any suit or proceedings so brought as fixing the proportionate amount of his or their individual liability hereunder."

It is further stipulated that all annual statements and reports of Canners Exchange Subscribers filed with the Insurance Department of the State of New York and each and every part thereof may be received in evidence; that the operations of Canners Exchange Subscribers during the period that they have been licensed by the Superintendent of Insurance of the State of New York have been in substantial compliance with Article 10, Chapter 28, of the Consolidated Laws of the State of New York as they existed before the enactment of Chapter 882 of the Laws of 1939.

It is further stipulated that the Superintendent of Insurance of the State of New York intends to enforce all existing provisions of the Insurance Law of New York against the plaintiffs herein including Section 130 of the Insurance Law of 1939 relative to the countersigning of policies by a resident agent, and has announced his determination so to do.

(Five minute recess taken.)

[fol. 69] Mr. Trueblood: I will call Mr. Cate.

ARLINDO S. CATE, called by the plaintiffs and having been first duly sworn as a witness, testified as follows:

Direct examination.

By Mr. Trueblood:

Q. Will you state your name, please?
A. Arlindo S. Cate.
Q. And where do you live?
A. I live in Evanston, Illinois.
Q. What is your business or occupation?
A. I am vice president of Lansing B. Warner, Incorporated.
Q. And state briefly to the Court, please, what your education has been?
A. Grammar school, high school education, college——

Mr. Trueblood (interrupting): Pardon me just a moment. Is it necessary for counsel to be on his feet in the interrogation of witnesses?

The Court: No, it is not. You may be seated.

A. (Continuing): Liberal arts education at the University of North Carolina and law school at the University of North Carolina.

Q. Are you a graduate of the Law School of that place?

A. I am.

Q. And of the College of Liberal Arts?

A. I am.

Q. Are you a member of any Bar?

A. I am a member of the Bar of Illinois and a member of the Bar of North Carolina.

Q. But you're not practicing law?

A. I am not.

[fol. 70] Q. Now, state briefly to the Court as Vice President of Lansing B. Warner, Incorporated, what your duties are?

A. My duties are supervision of the books, custody of the books of the corporation and of the several subscribers, both Warner Reciprocal Insurers and Canners Exchange Subscribers, at Warner Exchange Bureau, consulting with the various departments of Lansing B. Warner, Incorporated, in connection with loss matters, in connection with general matters of policy.

Q. And as part of your duties have you been out on the territory where the several risks are located?

A. I have.

Q. Now, Mr. Cate, are you thoroughly familiar with the various workings and operations of Lansing B. Warner, Incorporated, and the two groups of inter-insurers involved in these causes?

A. I am.

Q. I should like to have you state briefly what the history of these two groups has been and when they started, when the attorney in fact was organized, and give the Court a brief but connected representation of it up through the years, or rather the exchange up through the years?

A. Mr. Lansing B. Warner was prior to 1907 an insurance broker in the State of Illinois who had specilalized largely in attempting to secure insurance for the canning industry,

the various canners of the United States. He had had great difficulty in placing any insurance for the canning industry and he conceived the idea of the canners carrying their own insurance by an exchange of contracts among themselves; whereupon, he saw several of the canners [fol. 71] that he knew and explained his idea to them, and they agreed to enter into this venture, whereupon they began exchanging contracts of inter-insurance in the year 1907. Mr. Warner was appointed under the power of attorney signed by each one of the canners participating in this exchange of indemnity. Mr. Warner was appointed personally their attorney in fact to effect the exchange of insurance for them.

Q. Now, was that exchange begun under the auspices of the National Canners Association?

A. It was. It was approved—this plan was approved by the National Canners Association. It began in 1907. In 1911 Mr. Warner formed a corporation known as Lansing B. Warner, Incorporated, an Illinois corporation, and the corporation was then substituted for Mr. Warner's personal attorney in fact. The corporation then became the attorney in fact for the subscribers. In 1912 a new exchange of contracts was begun among wholesale grocers largely. Then in 1926 the name of Wholesale Grocer Subscribers which was used from 1912 to 1926 was changed to Warner Reciprocal Insurers, which is the designation now used for that group of subscribers.

Q. Now, state briefly some data regarding the numbers of subscribers and the assets and so on of the two groups?

A. Canners Exchange Subscribers of Warner Insurance Bureau are composed of approximately one thousand subscribers, all of whom are engaged in the canning industry or in similar and allied lines, connected with the canning industry. This number varies of course slightly. I believe the exact number now is nine hundred and eighty-six, [fol. 72] but it remains right around the number one thousand and has for many years. Of Warner Reciprocal Insurers there are approximately twenty-one hundred subscribers at the present time. The assets as shown by our statements for Canners Exchange Subscribers are roughly four million a hundred and some thousand; for Warner Reciprocal Insurers the assets are roughly a million and a half. These funds are of course the aggregate of the indi-

vidual funds of the subscribers which have been deposited pursuant to their contracts.

Q. Now, I should like to ask you a few questions about definitions. What is meant by a subscriber?

A. A subscriber is an individual—is a term used to describe an individual, a partnership or a corporation that appoints Lansing W. Warner, Incorporated, its attorney in fact to act for them in the exchange of this indemnity with other individuals, partnerships and corporations who have also appointed Lansing B. Warner, Incorporated, its attorney in fact for this purpose.

Q. Mr. Cate, I should like to have you give the Court an elementary illustration of just how this indemnity is effected. That is, take some hypothetical subscribers, say A, B, C, D and E, and explain to the Court how they insure themselves and what their proportionate liability is in the event of a loss and so on. Just give us an elementary hypothetical instance?

A. As an elementary example we will say there are three subscribers, A, B and C, resident we shall say in different states. They agree among themselves that they will carry their own insurance, that if one of the three suffers a loss [fol. 73] that loss will be divided among the three. Mr. Warner conceived this idea from the old Chinese legend of the Chinese junks going down a stream. As they went down to the rapids there was danger. We will say three junks were going down. There was a danger that one might be wrecked in the rapids and thereby lose all that he has and so the Chinese conceived the idea of dividing the cargo among the three ships so that if one ship were to be lost each one the three would lose only one-third of his cargo. In like manner if a loss is sustained by these three subscribers, one of them has a plant that burns down, the loss is divided over the three subscribers. It is borne in the relation that his deposit which has been made and which has been described——

Q. (Interrupting): Yes, but let us have a deposit described now for the record?

A. Suppose there are the three. Each subscriber makes a deposit of one hundred dollars, therefore there is a total in this illustration of three hundred dollars. And a total loss occurs. Each subscriber would then pay his proportion of the loss in the ratio that his deposit bears to the

aggregate deposit of all subscribers. His deposit being one hundred and the total being three hundred, each subscriber in this instance would bear one-third of the loss.

Q. Now, does that proportion to which you have just referred hold good in regard to the expenses of the insurance?

A. It does.

Q. State just briefly what those expenses are?—

A. Those expenses are expenses of losses, taxes, legal expenses. They are briefly the main ones.

[fol. 74] Q. Are the subscribers as you have defined them in any way bound together or do they pursue their several lines of endeavor without reference to the contracts of inter-insurance?

A. They do.

Q. And there is no entity among the subscribers?

A. There is no entity whatsoever.

Q. And no holding out of the subscribers of any insurance business or being in any insurance business?

A. There is not.

Q. Now, I should like to have you explain what a saving is in the nomenclature of reciprocal insurance?

A. When a deposit is made it usually conforms to the amount of premium charged by a stock insurance company for a similar risk. The losses are divided among the several subscribers, as we have explained, and that which is left over after payment of losses and expenses in their particular deposit is what we term savings. It is the difference between the actual cost of the insurance and the estimated cost. The yardstick paid for the original deposit to conform largely to the original premium or the premium of a stock company provides a yardstick by which we may measure their saving in cost of insurance over their cost if it were with a stock insurance company.

Q. Now, I ask you not to go into detail but is all of the amount turned over to the agent by the subscriber at the beginning of the term of insurance returned after expenses and losses—payment for losses—are deducted?

A. It is all returned to him. Part is set up in a reserve fund—he still retains title of course to his money—and part is returned to him in cash.

[fol. 75] Q. Upon his ceasing to be a subscriber?

A. Upon his ceasing to be a subscriber all of the money is returned to him.

Q. And when the reserve specified is built up no further part of that deposit goes into reserve, but all of it is returned to the subscriber, subject to the payment of losses and expenses?

A. That is correct.

Q. I should like to have you state, Mr. Cate, in general who the subscribers in Canners Exchange are?

A. They are individuals, partnerships, firms and corporations scattered throughout the United States and parts of Canada who are engaged in the canning industry or allied lines, and almost all are in the canning industry. They are corporations and firms that are prominent in the industry, and large packers.

Q. And also individuals?

A. Individuals I stated.

Q. Now, name some of the subscribers in Canners Exchange—a few of them in New York State?

A. The Snider Packing Corporation.

Q. Where are they?

A. In Rochester, New York.

Q. Yes?

A. The Comstock Canning Corporation in Newark, New York; the Curtis Brothers, in Rochester, I believe, and the Empire State Pickling Company and I do not remember their home office.

Q. Now, if you care to, name two or three subscribers residing in other jurisdictions?

A. The H. J. Heinz Company.

Q. Where are they?

A. Of Pittsburgh. The Hoopeston Canning Company, which is one of the parties.

Q. That is one of the plaintiffs in the Smith action?

[fol. 76] A. And Mr. Smith of Pennsylvania.

Q. Is that James T. Smith, one of the plaintiffs in the Smith action?

A. It is. He is.

Q. And Harry M. Brown?

A. He is.

Q. Is a plaintiff in the Smith action? Now, I ask you the same question in relation to E. Pritchard, Incorporated, named as a plaintiff in the Smith action?

A. He is a subscriber.

Q. And where is the office of E. Pritchard, Incorporated?

A. In New Jersey.

Q. And all of the individuals and corporations named as parties plaintiff in the Smith action are and have been subscribers to Canners Exchange Subscribers at Warner Exchange Bureau?

A. That is correct.

Q. Now, I ask you virtually the same question in regard to the group of reciprocal insurers in the Ben A. Morton action, which concerns the Warner Reciprocal Insurers.

A. Ben A. Morton is a subscriber.

Q. Where does he reside?

A. In Tennessee.

Q. And Paul E. Emerson?

A. Paul E. Emerson, of the State of New York; he is a subscriber.

Q. What is his address?

A. Newark, New York.

Q. Is he a canner?

A. Yes.

Q. Now, I ask you the same question in regard to E. Pritchard, Incorporated, and Hoopeston Canning Co.

A. They are both canners and are now subscribers, E. Pritchard main offices being in Bridgeton, New Jersey, and Hoopeston Canning Company being in Hoopeston, Illinois.

Q. Recurring to the Canners Exchange Subscribers group, are most of the subscribers canners in that group—or state [fol. 77] very generally who the subscribers are in relation to their qualifications or standing in the canning industry.

A. The subscribers are, generally speaking, the leaders in the canning industry and the outstanding canners of the United States.

Q. What is the largest canning organization in the United States?

A. The California Packing Corporation, I believe?

Q. Are they subscribers to Canners Exchange Subscribers?

A. They are.

Q. And they have been for many years?

A. They have.

Q. I am not sure. Did you state the approximate number of subscribers in each group in New York State?

A. I did not.

Q. Will you, please?

A. The approximate number of Canners Exchange Subscribers at Warner Insurance Bureau, subscribers in New York, is approximately ninety-three. The approximate——

Q. (Interrupting): Ninety-three out of a total of how many?

A. Out of a total of roughly a thousand.

Q. Has that figure remained fairly constant through the years or has it been variable?

A. With, of course, the exception of the first or second year it has remained fairly constant and over the period of the last fifteen to twenty years it has remained practically at the same figure.

Q. Well, how many subscribers were exchanging contracts in the canners' group, say in 1912?

A. In 1912 approximately nine hundred and twenty-five or thirty.

Q. Now, I ask you the question in regard to the numbers [fol. 78] concerning the Warner Reciprocal Insurers group?

A. There are approximately two hundred and thirty subscribers in the State of New York and approximately twenty-one hundred scattered throughout the United States and Canada.

Q. Will you give us one or two names of subscribers in the New York States, please?

The Court: If I may interrupt; is that in addition, that twenty-one, to the two hundred?

A. No, that includes the two hundred and something in New York State. Your question?

Q. (Question read from record as follows: "Will you give us one or two names of subscribers in New York State, please?")

A. The Pepsi-Cola Company in New York City, the R. C. Williams Company of New York, the Seaman Brothers.

Q. Where are they?

A. I believe they are in New York City also.

Q. And any others in other states that you can mention?

A. The Kellogg Grocery Company.

Q. Where, in Battle Creek?

A. No, in Philadelphia. The Hubbard Grocery Company in West Virginia. The California Packing Company and Heinz Pickle Company.

Q. They're also subscribers in Warner Reciprocal Insurers?

A. They are.

Q. And have been for many years?

A. For many years.

Q. Now, you mentioned some little time ago the name of the National Canners Association. Will you explain briefly to the Court what that is?

[fol. 79] A. The National Canners Association is a voluntary association of the canners of the United States who have formed their association to advance their interests or to advance the interests of the canning industry.

Q. And I should like to have you state where Mr. Lansing B. Warner is at the present time.

A. Mr. Lansing B. Warner is in Pinehurst, North Carolina, at the present time.

Q. And what is the condition of his health?

A. He was not well enough to be here. He wanted to come very much.

Q. And who are the other officers of Lansing B. Warner, Incorporated?

A. The other officers are Mr. Clarence R. Leland, executive vice president, and John Elliot Warner, vice president.

Q. Where are they today?

A. They are both in Chicago.

Q. Will you state briefly why they are not here, if you know?

A. There was a tragedy in the Warner family. Mr. John Elliot Warner's sister passed away Saturday night. Mr. Leland is in Chicago looking after the business.

Q. While Mr. Warner——

A. (Interrupting): Mr. Lansing B. Warner is in Pinehurst.

Q. And Mr. Elliot Warner is in charge of the office?

A. Yes.

Q. Where is the office of Lansing B. Warner, Incorporated?

A. It is at 540 North Michigan Avenue, Chicago.

Q. Do you or do either of the groups have any other offices?

A. They have no offices other than at 540 North Michigan Avenue in Chicago.

Q. Have they ever had any other office than the Chicago office?

A. They have not.

[fol. 80] Q. They have never had any office or agent in the State of New York?

A. No, they have not.

Q. And of course you exclude the statutory agent for the service of process?

A. Oh, of course. That is the Commissioner of Insurance. He is the statutory agent for the service of process.

Q. The defendant, Mr. Pink?

A. Yes.

The Court: Of course, when you say New York, they have never had any other office in any other state?

A. No, that is correct.

Mr. Trueblood: I should like to have these documents marked.

(The documents referred to were marked Plaintiffs' Exhibit 1 for identification and Plaintiffs' Exhibit 2 for identification.)

Mr. Trueblood: What is your practice? Do you usually mark your documents for identification?

The Court: Well, unless there is objection mark them in evidence.

Mr. Trueblood: I offer in evidence Plaintiffs' Exhibits 1 and 2 for identification, the licenses issued by the Director of Insurance of the State of Illinois to both groups.

The Court: Admitted.

(The documents so admitted in evidence were marked Plaintiffs' Exhibit 1 in evidence and Plaintiffs' Exhibit 2 in evidence.)

[fol. 81] Q. No. Mr. Cate, I ask you to state briefly what plaintiffs' Exhibits 1 and 2 are?

A. They are the licenses issued by the State of Illinois authorizing the exchange of these insurance contracts pursuant to the Illinois Insurance Code.

Q. To both groups?

A. To Canners Exchange Subscribers at Warner Interinsurance Bureau and to Warner Reciprocal Insurers.

Q. Now, I should like to have you outline briefly to the Court the procedure whereby new subscribers become subscribers.

A. This occurs in many ways. The usual manner, one of our subscribers recommends this plan of insurance to

one of his friends, usually engaged in the same business, and such friend may write into our office inquiring as to the plan, or the present subscriber may write in to us asking us to explain the plan to a possible new subscriber; whereupon he is—one of our representatives is instructed to call upon him or to investigate his properties to determine whether or not they are eligible—whether or not the subscriber is eligible to become a subscriber, prospective subscriber; a credit report is obtained determining the man's credit. The attorney in fact consults with many of its present subscribers to determine the standing of the prospective subscriber in his community, his general reputation for honesty, his moral hazard, and by that we mean more his general housekeeping ability and carefulness more than the possibility of someone committing arson or setting fire to his plant. And after that has been determined and the attorney in fact is satisfied from reports from the prospective subscriber's bank and various other sources that the [fol. 82] prospective subscriber possesses the qualifications, the application blank is forwarded to him.

Q. Does Lansing B. Warner, Incorporated, have an underwriting department?

A. It has.

Q. And the purpose of that underwriting department is, of course, to pass upon the qualifications of any persons or firms or corporations seeking to become subscribers?

A. The underwriting and engineering department.

Q. Yes. Well, explain a little further about the engineering department.

A. The engineering department consists of approximately twenty-five or six representatives.

Q. Proceed, please.

A. There are approximately twenty-five or twenty-six trained insurance engineers specializing in fire insurance hazards, that have made a careful study of and have been trained in fire insurance hazards, that consult with subscribers as to the best ways to lower their hazards by building fire walls, by putting in wire glass windows, by the many ways known to insurance engineers of lowering the hazard by fire.

Q. Do these trained insurance men work out of Chicago?

A. They travel out of Chicago.

Q. And is it part of their duty to keep in fairly constant touch with the several subscribers to the end that hazards

and risks be kept as low as possible and properties in the finest condition possible?

A. That is true both from the standpoint of the particular subscriber that they consult with to prevent his having a loss and for the benefit of all the subscribers in keeping the losses at the lowest possible point.

[fol. 83] Q. Is it part of the duty of these trained insurance engineers to solicit new subscribers?

A. It is not.

Q. Is there any attempt made by Lansing B. Warner, Incorporated, to enlarge the number of subscribers in either group?

A. There is not such an attempt. The engineers have no authority to accept any subscribers. By the terms of the power of attorney and appointment of agent that acceptance may take place only in Chicago. The engineers may of course recommend, and we ask their opinion as to whether or not a prospective subscriber is eligible, but they have no authority whatever to accept any subscriber.

Q. And is it a part of their duty to try to secure new subscribers in either group?

A. It is not.

Q. And the primary business and concern of the trained engineers is to service these outstanding contracts and cooperate with the subscribers in keeping the risks as low as possible, is it not?

A. That is correct.

Q. Now, tell the Court briefly about the advisors who are appointed under the powers of attorney in each group.

A. The advisors of Warner Reciprocal Insurers are all subscribers.

Q. Who are they and what is their purpose?

A. They are subscribers—do you mean by that to give their names?

Q. Yes, give the names.

A. Ben A. Morton of Tennessee is a subscriber.

Q. In what group?

A. In Warner Reciprocal Insurers. Mr. Mackey of Philadelphia, Pennsylvania, is a subscriber and an advisor; Mr. Hershey of West Virginia is a subscriber and an ad-

[fol. 84] visor; Mr. Koonz of Iowa is an advisor.

Q. Spell that name.

A. K-o-o-n-z.

Q. And he is a packer in Iowa?

A. No, he is a wholesale grocer in Iowa.

Q. And Tom Hale?

A. Tom Hale of Oklahoma.

Q. Now, state the advisors in the canners' group, please.

A. The advisors in the canners' group: Mr. Harry L. Cannon of Delaware, Mr. Albert M. Lester of San Francisco, California.

Q. Who is he?

A. He is vice president of California Packing Corporation.

Q. That is the largest canner, you say, in the United States?

A. I believe so. And Mr. Edward F. Triego of Hoopeston, Illinois, Mr. S. E. Comstock of Rochester, New York.

Q. What is his company?

A. His company? He is chairman of the board of Snider Packing Corporation.

Q. Is that one of the large companies?

A. That is one of the large subscribers.

Q. In the canning industry?

A. In the canning industry; and Edward B. Cosgrove of the Minnesota Valley Canning Company.

Q. Of Minnesota?

A. Of Minnesota.

Q. Now, state very briefly what the nature of the duties of these advisors is.

A. To advise and consult with the agent as to problems that arise, to offer suggestions to the agent, to supervise and have custody of the funds which are deposited and to sign checks disbursing those funds from the accounts of the several subscribers.

Q. And what is the duty of the advisors, if any, in rela- [fol. 85] tion to the passing upon the qualifications of new subscribers?

A. It is an advisory capacity. They are consulted for the opinion which they may have to offer regarding a new subscriber.

Q. And they give the attorney in fact the benefit of their judgment and advice in reference to any new subscriber?

A. The advisory committee—all of the members are of course very prominent in the canning industry and know most of the individuals and companies in the canning industry, and they are in a good position to advise the agent.

(Document of Warner Reciprocal Insurers marked Plaintiffs' Exhibit 3 for identification, and document of Canners Exchange Subscribers marked Plaintiffs' Exhibit 4 for identification.)

Q. I show you Plaintiffs' Exhibits 3 and 4 for identification and ask you to state what they are?

A. These are the applications for Warner Reciprocal Insurers and for Canners Exchange Subscribers at Warner's inter-insurance exchange.

Q. Are they the documents, Exhibits 3 and 4, to which you referred a few moments ago that the prospective subscriber executes?

A. They are.

Q. And what does a subscriber do with them in the course of business?

A. He mails these to Lansing B. Warner, Incorporated, in order that the attorney in fact may determine whether or not the prospective subscriber will be acceptable.

Q. Does he send any other document with them?

[fol. 86] A. He sends the power of attorney with them.

Mr. Trueblood: I ask that these be marked for identification.

The Court: Mark them in evidence.

(Plaintiffs' Exhibits 3 and 4 for identification were marked Plaintiffs' Exhibit 3 in evidence and Plaintiffs' Exhibit 4 in evidence, and two additional documents were marked Plaintiffs' Exhibit 5 and Plaintiffs' Exhibit 6, respectively.)

Q. I show you, Mr. Cate, Plaintiffs' Exhibits 5 and 6, and ask you to state what they are.

A. They are the Warner Reciprocal Insurers' appointment of agent and the Canners Exchange Subscribers' at Warner Insurance Bureau power of attorney.

Mr. Trueblood: Now, these documents are received in evidence, your Honor?

The Court: That's right.

Q. Now, Mr. Cate, I should like to have you continue tracing the course of business of the agent in respect to new members. Take these two powers of attorney, Plaintiffs' Exhibits 5 and 6, and state briefly to the Court the course of business in the office of the agent in reference to

a new subscriber coming in, what takes place and how the contracts of inter-insurance are issued and so forth. If you have those documents for a guide it will hurry you considerably.

A. I will say at this point now that the agent has determined that a prospective new subscriber is qualified to become a subscriber, and the agent has this signed appointment of agent in his hands. By this document the subscriber [fol. 87] appoints Lansing B. Warner, Incorporated, his agent with the authority as set out in the appointment of agent. The agent, which is Lansing B. Warner, Incorporated, is authorized for the subscriber to effect an exchange of insurance——

Mr. Kiebala (interrupting): Just a moment. That all appears in this agent's powers?

A. Yes.

Q. Tell what is done, Mr. Cate——

Mr. Kiebala (interrupting): What is that—five?

A. Five and six.

Mr. Kiebala: That is all stated in there?

A. Yes.

Mr. Kiebala: I object to that. I think that speaks for itself.

Mr. Trueblood: I quite agree your Honor. What I want is that the witness should state what is done in the office.

The Court: All right. If that is a guide to you you may use it.

Q. Just give the ordinary course of business. If that is any guide to you you may use it.

A. This is set out in detail. The agent is authorized to effect an exchange of insurance between the subscriber signing this document and all other subscribers who have signed a similar document.

Q. By that you mean the power of attorney?

A. I do.

Q. Exhibits 5 and 6?

A. Exhibits 5 and 6. The agent or the attorney prepares an inter-insurance contract.

[fol. 88] Q. Now, wait a minute. That is after the agent has passed favorably upon the qualifications of the new subscriber?

A. That is correct.

Q. And suppose the agent rejects the new subscriber or the person or firm or corporation who tries to come in?

A. Then there can be no contract of inter-insurance.

Q. All right. Proceed.

A. The agent prepares an inter-insurance contract by executing to this, to the form of the contract in Chicago, the name Warner Reciprocal Insurers or Canners Exchange Subscribers at Warner Inter-insurance Bureau.

Mr. Trueblood: Now, wait a minute. I offer these policies or contracts in evidence as Plaintiffs' Exhibits 7, 8, 9 and 10.

(The documents so offered were received in evidence and marked Plaintiffs' Exhibits 7, 8, 9 and 10, respectively.)

Q. I show you these documents, Plaintiffs' Exhibits 7 to 10 inclusive and ask you to state what they are?

A. These are sample inter-insurance contracts.

Q. And are those samples of the contract to which you just referred?

A. They are.

Q. Now by samples explain a little more in detail what the colors mean here and what they are?

A. The colors are solely for identification, the white being the Canners Exchange Subscribers at Warner Inter-insurance Bureau and the pink being the Warner Reciprocal Insurers.

Q. And what is the difference between Plaintiffs' Exhibits 9 and 10?

A. Plaintiffs' Exhibit 9 is the inter-insurance contract [fol. 89] issued by Canners Exchange Subscribers at Warner Inter-insurance Bureau.

Q. I think you don't understand the question.

A. Oh, I see. The Exhibit 9 is the Canners Exchange Subscribers at Warner Inter-insurance Bureau, the inter-insurance contract which is used in all of the cases with the exception of Illinois, and Plaintiffs' Exhibit 10 is the inter-insurance contract issued for Canners Exchange Subscribers at Warner Inter-insurance Bureau in the State of Illinois.

Q. And make the same explanation, if it is proper, in relation to the other exhibits, please.

A. Plaintiffs' Exhibit 7 is a Warner Reciprocal Insurers inter-insurance contract for all of the United States except

Illinois, and Plaintiffs' Exhibit 8 is the Warner Reciprocal Insurers inter-insurance contract for Illinois.

Q. All right. Proceed with your narrative as to the course of business at the office of the agent.

A. The contract is signed in the name Warner Reciprocal Insurers or Canners Exchange Subscribers at Warner Inter-insurance Bureau in Chicago, Illinois, at the office of the agent.

Q. Signed by whom?

A. By some one authorized by the agent to so countersign.

Q. It is signed by the agent or attorney in fact?

A. That is correct.

Q. Then what is done with the contract?

A. The contract is then mailed to the particular subscriber at his residence or place of business.

Q. Is it the invariable rule of Lansing B. Warner, Incorporated, to mail all contracts of inter-insurance to these subscribers?

A. It is.

Q. And how many contracts of inter-insurance affecting [fol. 90] New York risks have been executed since these two exchanges began?

A. Roughly fifty thousand.

Q. You may proceed in answering your question and continue your narration of the course of business in the office of the agent.

A. When the contract of inter-insurance is mailed [illegible] agent notifies the subscriber that a deposit will be requir[illegible] whereupon the——

Q. (Interrupting) Well, now, who determines the amou[illegible] of this deposit?

A. The deposit is determined by the agent.

Q. And how is it determined?

A. It is determined on the basis of the amount of inde[illegible]nity desired by the subscriber, the physical characteristi[illegible] of the property and the physical hazards. The agent requires this deposit and the subscriber makes such a depos[illegible]

Q. Physically how is it made up—by checks sent in?

A. It is made by checks sent in to the agent in Chica[illegible]

Q. By mail?

A. By mail.

Q. So that in that entire procedure in a person, firm or corporation becoming a subscriber, the insurance engineer has nothing to do with it and handles no papers and in no way has any connection with that subscriber becoming a subscriber?

A. No. That is determined in Chicago.

Q. And every transaction with the subscriber, as I understand it, is handled by mail between the office of the agent and the subscriber?

A. Yes.

Q. All right, proceed.

A. This amount of deposit is known as the guaranty deposit. In Canners Exchange Subscribers at Warner Inter-insurance Bureau——

fol. 91] Q. (Interrupting) Pardon me, Mr. Cate, but supposing in referring to Canners Exchange you omit the rest of that because each time the reporter has to copy that long name.

A. In Canners Exchange it is known as expense and guaranty fund deposit. This deposit is held and disposed of as a separate and individual fund of the particular subscriber, out of which his liabilities are secured and paid to the extent of those liabilities.

Q. Now, what about the bookkeeping operation in respect to those deposits?

A. The books are kept at the office of the agent. Each subscriber has a separate account and each deposit made by the particular subscriber is recorded in his separate account, the money being his and merely on deposit there to secure his obligations arising out of this exchange of contracts.

Q. And the practise of the corporation is to set up on its books the ownership of the deposit in the susbcriber?

A. Every penny of it.

Q. And what is done with that money that is received by the agent as a deposit? Is it all put together or what happens?

A. It is deposited in several banks; by that I do not mean a separate deposit for each subscriber but it is deposited in various banks as the advisory committee and the agent determine is feasible under the designation of Canners Exchange or Warner Reciprocal Insurers.

Q. For convenience how is the money taken out of the deposit and paid over? That is, is it done by monthly or annual periods or what is the modus operandi?

A. The books are closed at the end of each month and the total losses and expenses for that month are determined [fol. 92] and, as I say, the books are closed, all of the—each subscriber paying his particular proportion of losses and expenses for that particular month.

Q. I think we can be a little more lucid on that. A subscriber, say, comes in or rather receives a contract of inter-insurance. Now, that contract is for a year. For book-keeping purposes that contract will be divided into twelve parts, will it?

A. That is correct.

Q. One for each month?

A. One for each month.

Q. And the deposit is allocated, is it, to each month?

A. To take a hypothetical case, suppose a subscriber makes an initial deposit of one hundred and twenty dollars. Then ten dollars or one-twelfth of the total amount will be credited to his account each month. Out of this ten dollars his proportion of losses and expenses will be paid and the same is true for every other subscriber.

Q. At the end of the monthly period what becomes of that part of deposit turned over which has not been needed for the payment of losses and expenses?

A. The unused portion of the subscriber's account at the end of the month is transferred to an account of the principal on the books of the agent, which is known as the savings account.

Q. And what becomes of that savings account?

A. The savings account is accumulated throughout the year until the end of the calendar year. At that time the sums for the various months are added together and the total of the savings account of each subscriber is determined. In Warner Reciprocal Insurers one-fifth of the credit balance is paid to the agent as additional compensa- [fol. 93] tion. An amount that is determined by the agent with the approval of a majority of the advisors but not exceeding one-half of the credit balance at the end of any year is set aside as a separate and distinct fund of the particular subscriber known as the reserve fund. The remainder of the credit balance of the savings account is returned to the subscriber in cash.

Q. And what is that called?

A. We call it the cash savings.

Q. And what is the purpose of the reserve fund?

A. It is to build up additional security, which we have never had occasion to call upon, but it is building up funds of the particular subscriber over and above his initial deposit which is made each year to secure his obligation in the event of some unforeseen catastrophe.

Q. And to what extent is the reserve fund built up?

A. The reserve fund in Warner Reciprocal Insurers is built up until it is one and one-half times of the guaranty deposit, which is the initial deposit.

Q. And how rapidly would that reserve build up in Warner Reciprocal Insurers?

A. The advisory committee and the agent have always considered that it depends upon expenses and usually it is built up by putting into the reserve fund each year around eighteen per cent of the savings.

Q. Is that in Warner Reciprocal?

A. That is in Warner Reciprocal Insurers.

Q. Now, as to the other group?

A. As to Canners Exchange Subscribers—this will require just a little further explanation.

Q. Well, give it, please.

[fol. 94] A. The initial deposit, as I have stated, is the expense and guaranty fund deposit. At the same time this is made the subscriber in Canners Exchange is required to put up a reserve fund immediately of not less than ten dollars. He may increase this and as a practical matter it is always done—increase to an amount equal to two dollars for each one thousand dollars of indemnity in force. That is his reserve fund which determines his participation in losses and expenses.

Q. Now, explain that a little further.

A. The Canners Exchange Subscribers participate in expenses. They pay their proportionate part just as in Warner Reciprocal Insurers, with the exception that their participation is based upon their reserve fund deposit, whereas in Warner Reciprocal Insurers it is based upon their initial deposit or guaranty deposit.

Q. So that in effect the separate and individual liability of each subscriber in Canners Exchange is determined in ratio to the proportion that that subscriber's outstanding

insurance bears to the total outstanding insurance of all of the subscribers?

A. That is correct.

Q. Proceed on this Canners plan and tell the Court briefly about the reserve there.

A. The expense and guaranty fund, which is the initial deposit, is divided into monthly parts and is handled in very much the same way as the Warner Reciprocal Insurers with the exception that the participation in losses and expenses is based upon the reserve fund or insurance in force, whereas in Warner Reciprocal Insurers it is based upon the guaranty deposit. At the end of each month the remainder of the expenses and guaranty fund of the par-
[fol. 95] ticular subscriber is carried to a separate and individual account of each subscriber as a distinct and separate item termed a surplus. Then after this surplus has been determined for each month at the end of the calendar year a surplus reserve fund is created for each subscriber by crediting at the end of each calendar year to his separate account twenty per cent of the surplus of the subscriber at that time until such surplus reserve of the subscriber shall equal five times the reserve fund deposits of the subscriber. Once the surplus reserve has been built to that extent then the entire amount of the surplus is returned to the subscriber in cash.

Q. So that, briefly stated, out of the deposit of each subscriber losses and expenses are paid, including the commission to the attorney in fact—I don't believe you mentioned that—of twenty per cent?

A. Of twenty per cent.

Q. Out of which the attorney in fact pays all of the expenses of the exchange except certain expenses enumerated and a reserve is then built up out of the remainder of that fund until it attains a certain size and then after that the entire amount of the deposit not used as an expense or loss fund is returned to the subscriber?

A. That's correct.

Q. Now, in practise, Mr. Cate, has it ever been necessary to draw upon any of the reserves in either one of the groups?

A. It has not.

Q. And what becomes of those reserve funds in the two groups upon a subscriber discontinuing his being an inter-insurer?

A. Each subscriber has his separate account and all of his funds in those separate accounts are returned to him on his retiring.

[fol. 96] Q. You have stated that the funds received as deposits were put in banks. I don't believe you traced out the destiny of that money fully. What becomes of the money turned over? How is it invested?

A. The money is all in cash or United States Government bonds, Treasury bonds.

Mr. Trueblood: I ask to have these documents marked as exhibits.

(The documents so offered were received in evidence and marked Plaintiffs' Exhibit 11 and Plaintiffs' Exhibit 12 respectively.)

Q. I show you Plaintiffs' Exhibits 11 and 12 and ask you to state what they are?

A. Plaintiffs' Exhibit 11 is an annual report to subscribers made by Lansing B. Warner, Incorporated, agent for Warner Reciprocal Insurers.

Q. What is it?

A. Setting out the position of the aggregate of the several insurers accounts as at December 31st, 1939.

Q. And is the same true of the other exhibit?

A. The same is true of Plaintiffs' Exhibit 12.

Q. Which refers to what group?

A. Which refers to Canners Exchange.

Q. Were those two documents prepared under your supervision?

A. Those two documents were prepared under my supervision and Mr. Warner's supervision.

Q. And what was the purpose of their preparation?

A. The purpose of their preparation was to advise the subscribers as to the status of the plan and of their several accounts as at December 31st, 1939.

Q. In other words, those two exhibits are your official documents sent to all subscribers in both groups showing [fol. 97] the financial affairs and the status of the two groups and the attorney in fact at the close of business December 31st, 1939?

A. That is correct.

Q. Are these documents, Plaintiffs' Exhibits 11 and 12,

true and correct statements of the figures and facts therein purported to be shown?

A. They are.

Q. Now, I'd like to have you go ahead with your explanations of how the affairs of the agent are conducted in Chicago and particularly with reference to losses.

A. With reference to losses, when a loss occurs a subscriber notifies us by telephone, by wire or sometimes by letter telling us that a loss has occurred on his property, whereupon he usually set outs the amount of such loss and the attorney in fact or the agent wires him that he will pay such a loss and the usual thing is that the subscriber shortly after submits a bill to us showing the amount of his loss and we pay him.

Q. Do you use a form of proof of loss?

A. Not always. Most fires that occur are small losses and when they send in by letter claiming that they have had a loss, that is a sufficient proof of loss usually. However in some——

Q. (Interrupting): Would that be paid by return mail?

A. It would be paid always by mail. All losses paid from the office in Chicago.

Q. How are losses paid in all cases of loss in Canners Exchange?

A. By a check signed by two members of the advisory committee and the attorney in fact; in Warner Reciprocal Insurers it is signed by one advisor and the attorney in fact or the agent, and it is forwarded by mail to the subscriber at his residence or place of business.

[fol. 98] Q. Is it an invariable rule of business in your office that all losses be paid by check by delivering the check by placing it in the mails at the office of the agent in Chicago?

A. It is.

Q. All right. Now, let us take a loss that is not a small routine loss and tell the Court briefly how it is handled.

A. Sometimes we have large losses, particularly in the canning industry. They often have large warehouses stored full of canned goods, and we may have a loss amounting to forty or fifty thousand dollars. In such a loss we often send an inspector to the property, to examine the property, inspect it, look over it and return to Chicago and there advise us as to his opinion of the loss and what caused the loss, in order that our engineering department and so

forth may take steps to avoid any such a loss in the future. Then the attorney in fact has the copies of the inter-insurance contract and the amount of loss has been stated by the subscriber and our inspector has been in to examine or look at the property and a check is drawn and forwarded to the subscriber sustaining the loss.

Q. In the course of operations in either group do you have any such thing as an adjuster in the field or anyone clothed with the authority to make an adjustment?

A. Under our appointment of agent we have no authority to clothe anyone with the authority of a stock company adjuster to go out and adjust a loss.

Q. Do you in practice——

A. (Interrupting): We do not.

Q. There is no one or is there anyone out of the territory in the event of a loss to effect adjustment or to negotiate [fol. 99] for the other subscribers or the attorney in fact in relation to an adjustment?

A. No, we do not. We do not have that authority, under the documents appointing us the attorney in fact and agent.

Q. And all adjustments are stated in Chicago, are they, at the office of the agent?

A. At the office of the agent.

Q. And all agreements arising out of all losses are entered into in Chicago at the office of the agent?

A. They are.

Q. Do you use a proof of loss form at any time?

A. Yes, we do.

Q. I show you that document and ask you what it is?

A. This is a form that has been used. This is a form of proof of loss which has been used. It is a form not drawn by our office. It was drawn by the Cook County Loss Adjustment Bureau, in October, 1927. It is a form which we had used at times.

Mr. Trueblood: I offer this document in evidence.

The Court: Mark it.

(The document so received in evidence was marked Plaintiffs' Exhibit 13.)

The Court: Now, at this time I think we will recess until two-thirty.

[fol. 100] Afternoon session, March 26th, 1940.

(Counsel all present.)

ARLINDO S. CATE, recalled, testified as follows:

Direct examination.

By Mr. Trueblood (Continued):

Q. Your name, please?

A. Arlindo S. Cate.

Q. You're the same Mr. Cate who testified previous to this adjournment?

A. I am.

Q. Now, Mr. Cate, you were on the subject of the payment of losses at the time of the adjournment, and I should like to have you state what the practice is in respect to losses that are out of the ordinary.

A. As to losses that are out of the ordinary we send an inspector to investigate the loss and report to Lansing B. Warner, Incorporated in Chicago his findings there, and then a check is drawn in Chicago and mailed to this subscriber who has suffered the loss.

Q. Does that inspector do more than look at the ruins or the loss?

A. That is largely his duty, to look into the loss. He often and usually, if there are any questions that some outsider may have set fire to the property, investigates in the ruins to see what occasioned the fire, to the end that our engineers may take steps to prevent any such thing as faulty wiring or improper placement of fire extinguishers ever occasioning such a loss again.

Q. Does he perform any affirmative acts in relation to that loss?

A. No.

Q. And is it part of your duty as vice president of [fol. 101] Lansing B. Warner, Incorporated to examine the records of the corporation in respect to performance in the several states?

A. There is no performance in the several states.

Q. Yes. And if any acts were performed by any of these inspectors or trained engineers to which you referred would you know about them?

A. I would.

Q. And are acts of any kind performed by these trained engineers in the performance of their duties in respect to losses?

A. Only the acts which I have stated.

Q. And those acts consist of what?

A. Of investigating the loss, looking into the ruins, looking into the property at the scene of the loss.

Q. And those trained engineers, as I understand it, have no authority from the agent or the attorney in fact in any way to bind the corporation or either group of subscribers in relation to any settlement or compromise or adjustment of any loss?

A. They have not.

Q. What is that?

A. They have not.

Q. Now, I don't believe we covered the matter of compensation to the agent. Will you state briefly what that is—the practice?

A. The compensation to the agent is set out in the appointment of agent, it being twenty per cent of the guaranty deposit made by the particular subscriber.

Q. Now, what if any expenses are paid by the agent out of that twenty per cent?

A. All expenses are paid by the agent excepting those expenses enumerated in the appointment of agent.

Q. By all expenses you mean the expenses of the trained [fol. 102] insurance investigators, do you, and the office rent, the employees and general expenses of the attorney in fact?

A. Yes.

Q. I should like to have you explain why you use the words "agent" and "attorney in fact" as you do. What is the difference in those expressions?

A. They are both an attorney in fact. We use them to distinguish our capacity. We are acting as attorney in fact in both instances. However, in the Warner Reciprocal Insurers we use the term "agent" to distinguish the Warner Reciprocal Insurers group.

Q. And what do you call that power of attorney?

A. We call that power of attorney an appointment of agent.

Q. Now, in the performance of your duties as attorney in fact in Chicago is all business transacted in Chicago, whatsoever kind?

A. It is.

Q. And in practice do you ever depart from the strict

terms and conditions of the power of attorney or appointment of agent?

A. We do not.

Q. Now, as to this question of deposit I wish you'd explain how the deposit in this type of insurance differs from a premium in ordinary insurance.

A. In ordinary insurance the payment of a premium is simply that, the payment of such amount of money, which is the consideration for the contract or the policy and is the cost of such insurance.

Q. And is determinable in advance?

A. It is determined in advance and is so paid. Under the Warner Reciprocal Insurers' plan and the Canners Exchange plan a deposit is made and it is simply that—a [fol. 103] deposit of moneys, the subscribers retaining title to that money. It is for the satisfaction of his obligations arising under the exchange of these contracts. It is not a consideration for the contracts; that being expressly stated to be the consideration is the exchange of insurance.

Q. Are contracts of inter-insurance issued only to subscribers?

A. Only to subscribers.

Q. Who have executed powers of attorney to the attorney in fact?

A. That is correct.

Q. Now, in the carrying out of these several powers of attorney by the agent or attorney in fact in Chicago have you ever known or has your office even known of any instance where a signature to a power of attorney has either been placed thereon through mistake or error or through forgery?

A. We never have.

Q. And in the several plaintiffs joining in these actions do these plaintiffs sue in the representative capacity as representing the entire group of subscribers?

A. They do.

Q. I hand you these documents and ask you to state briefly what they are?

A. This is the annual report made by Lansing B. Warner, Incorporated, attorney in fact to Canners Exchange Subscribers at Warner Inter-insurance Bureau, showing the balance sheet and statement as at December 31st, 1938, and the other one is the same for Warner Reciprocal Insurers.

Mr. Trueblood: I offer these documents in evidence.

(The documents so offered were received in evidence and marked Plaintiffs' Exhibit 14 and Plaintiffs' Exhibit 15 respectively.)

[fol. 104] Q. I show you these documents and ask you to state briefly what they are?

A. The license issued by the Insurance Department of the State of New York to Warner Reciprocal Insurers and Canners Exchange Subscribers at Warner Inter-insurance Bureau.

Mr. Trueblood: I offer these documents in evidence.

The Court: Mark them received.

(The documents so received in evidence were marked Plaintiffs' Exhibit 16 and Plaintiffs' Exhibit 17 respectively.)

Mr. Trueblood: These are the originals. What is your practice on substituting? We have copies.

The Court: If there is no objection to the substitution of the copies in place of the originals they may be substituted. All right? Submit the copies. That is, when you submit the exhibits to the Court with your brief submit the copies instead of the originals. The record will so show.

Mr. Trueblood: Very well, sir.

Q. Mr. Cate, I hand you these documents and ask you to describe them briefly to the Court.

A. This is a report of examination by the State of Illinois, the Department of Insurance, made under date of October 18th, 1937, together with an examination made at the same time by the representatives of the State of Montana and Maryland, which examination report is filed with the National Convention of Insurance Commissioners and is the report of the National Convention of Insurance Commissioners regarding Warner Reciprocal Insurers.

[fol. 105] Q. Is New York State a member of the convention?

A. They are. New York State is a member.

Q. And do each one of those documents apply to each group?

A. Applies to each group. The same is true of Canners Exchange.

Mr. Trueblood: I offer them in evidence. These are exemplified copies.

Mr. Kiebala: Your Honor, I object to these statements in the State of Illinois, Montana or any other state. I think we should confine ourselves to the financial statements of the State of New York, and they will be unnecessarily cluttering up the record here if we put in the records of other states.

The Court: What is your purpose?

Mr. Trueblood: Simply to show the financial stability of the two groups. We have licenses from the Director of Insurance of Illinois, which are in evidence, and we simply want to show the examination of our affairs.

The Court: All right. I will receive them.

(The documents so received in evidence were marked Plaintiffs' Exhibit 18 and Plaintiffs' Exhibit 19 respectively.)

Mr. Trueblood: I offer in evidence a copy of the Illinois Insurance Code under which we operate.

Mr. Kiebala: Same objection. I don't see where that is relevant or pertinent to the issue in this state.

[fol. 106] Mr. Trueblood: I understand that the practice in this state requires this kind of proof.

The Court: Received.

Mr. Trueblood: And of course the Illinois provisions are written into the documents.

(The document so received in evidence was marked Plaintiffs' Exhibit 20.)

Q. State briefly what this document is?

A. This is an address—a copy of an address made by Mr. Lansing B. Warner on February 8th, 1916 at a meeting of the National Canners Association on co-operative insurance.

Q. And does that address describe the workings of the plan of Canners Exchange?

A. It does.

Q. And the members of the Canners Convention are subscribers for the most part, are they?

A. In a large part, yes.

Mr. Trueblood: I offer this. I realize it is a photostatic copy and may be technically objectionable on that ground

but we offer that for the purpose of showing how this plan has worked over through the years and to show that we aren't setting up something different now as a ground for complaint under New York Law.

The Court: It is only offered for the purpose of showing what the plan was. Received.

(The document so received in evidence was marked Plaintiffs' Exhibit 21.)

Q. Mr. Cate, do Warner Reciprocal Insurers and Can- [fol. 107] ners Exchange Subscribers pay taxes to the State of New York?

A. They do.

Q. And how long have those groups been paying taxes?

A. Since 1935 or 1936.

Q. I show you this document and ask you to state what it is.

Mr. Kiebala: I object to that. I don't see the materiality.

Mr. Trueblood: We want to show that that's the amount of taxes we paid to the State of New York.

The Court: The question asked was What is this? Read the question.

(Preceding question read from record.)

A. It is a statement of taxes, fees and contributions paid to the State of New York and New York Board of Fire Underwriters by Canners Exchange Subscribers and Warner Reciprocal Insurers.

Q. And does that statement contain a true and correct statement of those taxes as paid?

A. It does.

Mr. Trueblood: I offer that in evidence.

The Court: Any objection? Received.

(The document so received in evidence was marked Plaintiffs' Exhibit 22.)

Q. State what this document is briefly.

A. It is a letter from the Snider Packing Corporation addressed to Lansing B. Warner, Incorporated, acknowledging receipt of their savings for the year 1939, and complimenting Lansing B. Warner, Incorporated, on the accomplishments for the year.

Q. What is the amount of the saving?

[fol. 108] A. The amount of the saving is nineteen thousand five hundred and twenty-six dollars.

Q. Is the Snider Packing Corporation a New York corporation doing business in New York?

A. It is.

Mr. Trueblood: We offer that letter in evidence.

The Court: Where are they?

A. Their main office is in Rochester, New York.

Mr. Kiebala: Where did you get this?

Mr. Trueblood: Written from the Snider Packing Corporation.

Mr. Kiebala: From your files?

Mr. Trueblood: Yes. It is one of your New York packing corporations.

Mr. Kiebala: No objection.

The Court: Mark it.

(The letter so received in evidence was then marked Plaintiffs' Exhibit 23.)

Q. State what this document is, please?

A. This is an analysis of income and disbursements of and a comparison of losses and expenses of Warner Reciprocal Insurers as compared with five of the outstanding fire insurance companies, the data here being taken from the 1939 edition of Best's Insurance Reports.

Q. Is that a standard insurance publication?

A. It is.

Q. And was the document prepared by you?

A. It was prepared under my supervision.

Q. And you know it to be true and correct in all respects?

A. I do.

Q. And I show you this document and ask you to state [fol. 109] what it is.

A. The same is true of this document except that it applies to Canners Exchange Subscribers instead of Warner Reciprocal Insurers.

Mr. Trueblood: We offer these documents in evidence.

The Court: Mark them. Received.

(The documents so received in evidence are marked Plaintiffs' Exhibits 24, 25 and 26 respectively.)

Q. Mr. Cate, are the two groups, Warner Reciprocal Insurers and Canners Exchange Subscribers, desirous of retaining their license in New York State?

A. They are.

Q. And what are the advantages as the attorney in fact sees them in having a license in New York State?

A. By having a license in New York State, the subscribers would then be entitled to sue us in New York State; we could appoint the Commissioner of Insurance of the State of New York our attorney to accept service of process; also we would then file our annual statements as we do now with the Superintendent of Insurance of the State of New York and they would be here on file for examination by any subscriber that cared to examine them.

Q. And those reasons are primarily for the benefit of New York subscribers, are they?

A. They are.

Q. Now, was any attempt made at any time by the Superintendent of Insurance of the State of New York to enforce the old New York Insurance Law against either group or Lansing B. Warner, Incorporated in respect to a resident [fol. 110] agent countersigning the policy portion of that law?

A. No.

Q. Now, is there any necessity for any requirement that an appointment of agent or power of attorney be acknowledged in a manner sufficient to permit the recording of a real estate document?

A. No.

Q. Now, I'd like to have you state to the Court briefly how the cost of this inter-insurance compares to the cost of other insurance and give the reasons for any difference there may be.

A. The cost of the insurance to the subscribers is approximately from thirty to forty and sometimes fifty per cent lower than the cost of stock company insurance.

Q. Why is that?

A. The reason for that is that our expenses are lower. We do not have an agency system and——

Q. (Interrupting.) What percentage does that save the subscribers?

A. The agency system of course is on a graduated scale, but I would say on an average it increases the cost about twenty-five per cent.

Q. And do statistics bear out your figure on that?

A. They do.

Q. What else, if anything?

A. Our loss ratios—that is, the percentage of loss per amount of deposit—is far lower than the average of the stock companies and thereby less money is required for the payment of losses, and losses and expenses being lower, the net cost is of course lower.

Q. And I believe you stated this morning that that was in part due to your efficient trained engineering staff.

A. And the careful selection of risks.

[fol. 111] Q. Now, what part, if any, does the decentralization or the scattered nature of the risks play in that picture?

A. It prevents a conflagration in one section being——

Q. (Interrupting.) What is a conflagration in the insurance sense?

A. A conflagration is a very large fire—to give an example the fire in San Francisco in 1906, I believe, after the earthquake—or some large fire in which a city is wiped out, that would cause excessive loss in one particular region. And the attorney in fact is very careful that the subscribers are not all located in any one place, or the risks located in one section thereby bringing about the danger of an excessive loss that would result from a large fire.

Q. Give some example of that in New York State, please.

A. I don't know that I understand what you mean by that.

Q. What is the number of subscribers in any one spot?

A. The average, I would say, is one or two to a town or a village. There are more in New York City of course. The central offices of so many companies are in New York City. However these companies have risks scattered over the various parts of New York and parts of the United States.

Q. Well, now, are canners as a rule located in cities, towns or villages or are they out in isolated spots?

A. As a general rule they are not within a city. They are out in the farm communities where the goods are produced.

Q. What would the relation between the scattered nature of your specialized risks and that of a countersigning resident agent be?

A. He would serve no function. He could——

[fol. 112] Q. (Interrupting.) Why?

A. He would not be skilled in the type of service that Lansing B. Warner, Incorporated performs. He would be simply countersigning a policy within the State of New York.

Q. Would the risk in the normal course of events be located near the place of business or residence of the countersigning agent?

A. No.

Q. And it would make it impracticable, would it for a countersigning agent to see the property?

A. It would.

Q. Or inspect the property or render service to the subscriber.

A. It would.

Q. Now, I should like to ask you this: Based upon your experience in and your knowledge of insurance, do you have an opinion to a reasonable degree of certainty as to the consequences to Warner Reciprocal Insurers and Canners Exchange Subscribers attendant upon compelling them to cause all contracts of inter-insurance exchanged outside of the State of New York covering property in New York to be issued or effectuated through or countersigned by a resident agent?

A. I do.

Q. What is that opinion?

A. I believe that it would lead to the ultimate destruction of this plan of insurance.

Q. Will you state why, please?

A. It would add materially to the cost. It could in no way aid the efficient operation of the plan. It would thereby bring our contracts into the State of New York and subject them to the jurisdiction of New York and thereby injecting all of the law of New York into these contracts of inter-insurance which are Illinois contracts and thereby throw out of balance the system of inter-insurance as it is now operated.

[fol. 113] Q. And what, if anything, about conflicting provisions of the laws of the several states?

A. It would necessarily bring about conflict between the laws of the several states and the subscribers in one state would have rights and obligations different from subscribers in other states and thereby bring about inequities among subscribers.

Q. I ask you the same question now in regard to a statute or regulation that provided that no policy or contract of fire insurance shall be made, issued or delivered by insurers on any property in the State of New York unless it shall con-

firm in all particulars to the standard fire insurance policy of the State of New York.

A. Yes, I have an opinion.

Q. State what it is, please?

A. It would require Canners Exchange and Warner Reciprocal Insurers to include within its contract of interinsurance many, many terms that are in applicable. It would be writing New York legislation into those contracts which in respects may conflict with laws of other states.

Q. Please give one illustration of that.

A. The provision that the word "company" shall be used. The provision regarding a statement of the liability of the several subscribers.

Q. What do you mean by that, more specifically?

A. The statute in the New York Insurance Law which states that the subscribers shall have a contingent liability of not less than one nor more than ten times the amount of, as the statute says, the annual premium expressed in the policy.

Q. And what, if anything, in your opinion would the en-
[fol. 114] forcement of that statute do to you or the groups?

A. It would bring about inequities among subscribers which would ultimately lead to a breaking down of this plan.

Q. I ask you now the question originally asked as to an opinion in regard to a statute which requires that the term "advisory committee" shall include any official body, by whatever name called, chosen by the subscribers and which has, subject to the articles of association and power of attorney, ultimate power and responsibility in the management and control of the affairs of reciprocal insurers?

A. Yes, I have.

Q. State your opinion, please.

A. I believe that this would bring about a decentralization of the authority and would take the responsibility away from the attorney in fact who is experienced in these matters, such as underwriting and engineering, and place them in an advisory committee. It would be a decentralization that would ultimately wreck the plan.

Q. And would it be in harmony with the operation of the present system?

A. It would not be.

Q. But directly opposed to it?

A. But directly opposed to the present system.

Q. Now, I ask you the question as to your opinion which I have previously stated in regard to any statute or regulation which provides that foreign reciprocal insurers shall not make any new agreement for insurance with any person, firm or corporation not having assets in an amount not less than ten thousand dollars in excess of liabilities as shown by a report of a commercial agency having one hundred thousand subscribers or by a sworn statement and that before renewing a contract of insurance with all sub-
[fol. 115] scribers, similar proof of financial responsibility should be required, unless the subscriber has accumulated and maintains a so-called subscriber's operating reserve, purporting to be required by Section 418?

A. This is simply an arbitrary provision which denies to the small business man his right to enter into these inter-insurance contracts, if applied to Canners Exchange and Warner Reciprocal Insurers.

Q. Is there any necessity for such a provision?

A. There is no necessity for such a provision, and our experience of thirty-two years has shown there is no necessity.

Q. And what if anything would be the ultimate result?

A. It would deny to a great number of our subscribers the right to exchange these inter-insurance contracts.

Q. Now, without repeating the phrasing of my original question, calling for your opinion, I should like to have you state your opinion in regard to any regulation or statute which would compel foreign insurers licensed in the State to accumulate and maintain a special contingent surplus or guaranty surplus at the rate of one per cent of the subscriber's so-called net premium income for each year until an amount is accumulated at least equal to the amount of minimum surplus required to be built up, that is, two hundred fifty thousand dollars, without providing for the separate ownership thereof, and providing that the contingent surplus shall not be impaired or paid out by dividend, distribution or by returns, but to continue or to retire a subscriber's reserves or deposits except in the event of liquidation?

A. Yes, I have an opinion.

[fol. 116] Q. State it, please.

A. This would clearly increase the cost to each subscriber inasmuch as it would take moneys out of his separate ac-

count, which moneys are his, and set them up in a general fund, a joint fund. It strikes at the very heart of reciprocal insurance in requiring a joint fund and a joint liability of subscribers. In reciprocal insurance the liability is several. It is not joint. And to impose this joint liability would ultimately break down this system of inter-insurance.

Q. Well, that is the evil of the provision imposing joint liability in reciprocal insurance?

A. The evil of joint liability is that one subscriber might be held for another subscriber's liabilities.

Q. And perhaps wipe him out of business as a result of it?

A. Perhaps.

Q. Now, I ask you the same question calling for your opinion in regard to any provision that required non-resident insurers licensed in New York, such as the two groups under consideration, to execute and acknowledge a power of attorney in a manner sufficient for the acknowledgment of conveyance of real property to be recorded in the state in which the subscribers domicile?

A. This is simply throwing obstacles around the efficient operation of the plan and making it more inefficient and more expensive and more difficult.

Q. Now, I ask you the same question in regard to a provision which requires that the power of attorney shall provide for an annual meeting of the subscribers at which each subscribe shall have power to vote in person or by proxy, [fol. 117] for all members of the advisory committee to be chosen or appointed at such time, and which purports to provide that the power of attorney shall include a provision empowering the advisory committee to make regulations for the control and custody of funds and investments.

A. That is attempting to make a mutual company out of this, to provide for a board of directors and provide a membership in some sort of company or some sort of association which does not exist at all. It is just an attempt to hybridize this type of reciprocal insurance.

Q. And what, if anything, would be the effect of the enforcement of that provision against you?

A. Well, to decentralize the authority and break down the efficiency of the plan.

Q. Would it hamper it in its operation?

A. It would hamper it.

Q. Now, I ask you the same question calling for your opinion in regard to a requirement to the effect that every

contract of insurance and every power of attorney under which contracts of insurance are issued or exchanged shall provide for a contingent several liability for assessment on a subscriber as an inter-insurer on the risks of every other subscriber in an amount of not less than one nor more than ten times the amount paid for and in addition to the so-called annual premium expressed in such contract?

A. This is a change injected by the law of the State of New York, an attempted change in these contracts, that would change the liability as set out in the power of attorney and in these contracts, and in so doing would break down the nice balance of these inter-insurance contracts and would ultimately bring about unfortunate results.

[fol. 118] Q. I ask you the same question in regard to a requirement that every subscriber shall be required to accumulate a minimum operating reserve by authorizing the attorney in fact to credit to the subscriber an amount not less than one-quarter of such subscribers' earnings as an underwriter until such reserve is equal to the larger of the following amounts: Twice the amount of the so-called annual premium or premiums or the subscriber's pro rata share determined on the basis of the so-called annual premiums in force, or an aggregate operating reserve of one-half of one per cent of the aggregate amount of insurance in force?

A. This is the requirement of a building up of reserves far in excess of those reserves which have proven themselves to be sufficient. It is a requiring of subscribers to keep more money on deposit than any stretch of the imagination has shown to be necessary.

Q. Now, what has your experience been in regard to reserves?

A. Our experience has been that the annual deposit is sufficient to take care of all losses and expenses and return a good savings to the subscribers and to provide against the unforeseen which we do not believe can happen and which has not happened in our thirty-two years of experience. We believe in building up reserves but not to the extent that is required under the law which you have read. It is something new. No state requires it, and if a law does require that stock insurance companies have assets in the amount—have a surplus in an amount of two times their annual premium volume, there are a great many that would

not be able to continue their license in the State of New York.

[fol. 119] Q. And do either one of these groups have any earnings as an underwriter?

A. That expression is entirely foreign to reciprocal insurance.

Q. And does any subscriber in either one of the groups act in any capacity as an underwriter other than as a self-insurer and other than in a capacity similarly stated?

A. No.

Q. Now, I ask you the same question calling for your opinion as my first question in regard to a provision which would require that no subscriber shall have a secured or preferred claim against the operating reserve which shall be available for payment of claims of policyholders and creditors in preference to any claim for withdrawal.

A. It would impose clearly joint liability upon the subscribers which is absolutely contrary to the entire idea and plan of reciprocal insurance and would ultimately cause the falling apart of this plan and destruction of it.

Q. Now, I ask you the same question in regard to a provision providing that all the assets of foreign reciprocal insurers licensed, shall be liable primarily for payment of all liabilities incurred under their policies or their contracts and that no part of the surplus funds of the reciprocal insurers so licensed shall be subject to the claims of general creditors of any individual subscriber until all such policies under which any such subscriber is obligated, have been terminated and in no event beyond the amount of such subscriber's operating reserve. That's the question.

A. There again is an attempt to impose a joint liability upon the subscribers, which would break down this plan.

Q. Now, I ask you your opinion as before in regard to a [fol. 120] provision that requires that each subscriber's account be credited with premiums earned by him as an underwriter on the policies issued by the exchange and charged with his proportionate share of all losses incurred by such policies as well as with the expenses incurred by the insurer.

A. Will you state the last of that again?

(Preceding question read from record.)

A. There is no such thing as a premium. There can be no premium earned. I see no way to comply with such a

provision in that it has no application to reciprocal insurance.

Q. And what would be the result, in your opinion, of an attempt to apply that provision?

A. An attempt to apply it would break up the system. It changes the entire plan.

Q. Now I ask you for your opinion as aforesaid in regard to a provision that would require either group of insurers to maintain at least one office in the State of New York and which requires that every license issued by the State of New York to foreign reciprocal insurers shall state the principal place of business in the said state?

A. There is simply an attempt to impose an agency system upon this exchange of inter-insurance contracts, to increase the cost and to hamper the efficient operation of the plan.

Mr. Trueblood: You may cross examine.

[fol. 121] Cross-examination.

By Mr. Kiebala:

Q. Mr. Cate, this plan or inter-insurance or reciprocal insurance could be operated by the subscribers without an attorney in fact—is that right?

A. I don't think so, no.

Q. Wasn't that the original idea?

A. No.

Q. For instance, wasn't the plan limited to a few merchants who operated this system by themselves without an attorney in fact?

A. No, this plan started with Mr. Warner in 1907, the canners appointing him their attorney in fact.

Q. You said that the plan of inter-insurance was conceived by Mr. Warner as the result of some custom of the Chinese—is that right?

A. I said this plan.

Q. Are you acquainted with Mr. Charles M. Howell?

A. I know Mr. Charles M. Howell.

Q. Who is counsel to the American Reciprocal Insurers Association?

A. I know Mr. Howell.

Q. Are you aware of the fact that Mr. Howell in an address delivered at the annual conference of the Super-

intendents of Insurance of the Provinces of Canada at Winnepeg on October 6th, 1920, said reciprocal insurance had its beginnings in a merchants' club in the City of New York in 1881, then he goes on to say that these drygoods merchants had assembled for luncheon and, without reading what is in the text here, he suggested or rather one of these merchants at this duncheon suggested that in view of the high rate of insurance for drygoods firms in the City of New York that they formulate this plan whereby each of [fol. 122] these merchants would subscribe a certain amount of money towards the fund and in the event of a loss to pay the loss out of this fund and at the end of the year if there was no loss and one of the subscribers wished to withdraw he would be paid the full amount of his contribution plus interest? Did you know of any such plan?

A. Are you speaking—I don't know about that speech, no.

Q. Would you say it would be possible for a group of people to get together and operate an inter-insurance scheme without the aid of an attorney in fact?

A. No.

Q. Why not?

A. I don't think that the business men are well enough experienced in insurance engineering and in the varied problems of underwriting and in the intricate system of insurance, all of the hazards of fire insurance. I don't think so.

Q. Well, couldn't they do that on a small scale, say a dozen or half dozen living within the same city?

A. I would be inclined to doubt it. It is something that takes the attention of an expert to handle this sort of a plan.

Q. Do you know of your own knowledge, Mr. Cate, that at the inception of this plan that the several subscribers having an identical contract had the signature of each and every other subscriber to that contract?

A. What are you referring to? Are you referring to Mr. Warner's plan?

Q. No, I'm talking about the plan before the attorney in fact came into the picture.

A. I don't know of such plan.

Q. Would it be possible for each and every subscriber to exchange signatures—say there were ten subscribers and [fol. 123] the first went to the other nine and each in rota-

tion had the signature of the other nine participants in the scheme—wouldn't that be in effect the same as your power of attorney here?

A. Our power of attorney is signed by each subscriber, so to that extent each subscriber has affixed his signature to a similar power of attorney.

Q. Therefore the purpose of the power of attorney is to empower the attorney to subscribe for each and every one of these individual subscribers so as——

A. (Interrupting): That's right.

Q. So in effect if you had all of these subscribers getting together by themselves and signing these individual contracts, each member securing the signature of all the other subscribers, they would in effect be accomplishing what the attorney in fact does in your particular case?

A. So far as a particular policy if you were to get three thousand signatures on a policy, but that wouldn't be with the experience that an experienced man can put into this form of a contract.

Q. Therefore it is not a scheme which is entirely confined to the covenants and agreements as between the subscribers? What I'm trying to bring out is that the attorney in fact is a party to the scheme?

A. The attorney in fact is appointed by his document. I say by his document. By the power of attorney. He is appointed by that and it sets out his authority and limitations on his authority. That is his sole authority in connection with the exchange of these inter-insurance contracts.

Q. And the reason why it is necessary, you say, to have [fol. 124] an attorney in fact is because it requires a certain amount of business ability to determine risks?

A. I don't——

Q. (Interrupting): Expenses or risks?

A. I think you're misconstruing just a little. I think it requires that. I also think that a man in the normal course of his business, a canner for example, cannot spend his time investigating risks of a thousand other subscribers and determine whether or not they are good risks. I think it requires some one specialized in that particular thing to centralize the authority there and handle it from one office.

Q. In other words, when an organization becomes so large that it is impossible for each individual subscriber to

follow its workings, the attorney in fact does that for each individual subscriber?

A. I think that is true whether you have a few or many.

Q. Now, you say that the individual subscribers do not in any sense underwrite any risk. Now, what is the extent of the liability of the subscribers towards the other subscribers?

A. The liability of any one subscriber in Warner Reciprocal Insurers is to pay his proportionate part of the losses and expenses in the ratio that his guaranty deposit bears to all deposits.

Q. In other words, a share or portion of his deposit may be used for the purpose of paying the loss of each and every subscriber in the organization?

A. Correct, including his own loss.

Q. Then wouldn't you say he was underwriting the losses of these other subscribers?

A. He is agreeing to pay his proportion of any loss occurring.

[fol. 125] Q. Wouldn't that be merely a play of words, whether we call him a payer of the loss or underwriter of the loss? What does an underwriter do? He agrees to bear the loss—is that right?

A. He agrees to bear his portion of the loss, yes.

Q. You couldn't have inter-insurance if you just had one subscriber and an attorney in fact?

A. It wouldn't of course be inter-insurance. A man could of course carry his own insurance.

Q. Of course the loss if it was large, the loss borne by each of the subscribers would be large? You say that an inter-insurance plan could not be operated if there was just one subscriber and one attorney in fact—right?

A. It wouldn't be inter-insurance. That presupposes more than one.

Q. But you could have any number from two subscribers or more?

A. I would say so. One subscriber of course can carry his own insurance, so in the sense of self-insurance you can have one.

Q. Now, the more subscribers you have in the plan the smaller the loss to each individual subscriber in the event of a loss—is that right?

A. Not necessarily to each—would you state that just again?

Q. I say in the event of a loss where there are a greater number of subscribers and consequently a greater number of deposits the loss to be borne by each subscriber would be less than if the number of subscribers was smaller?

A. That's on any one particular loss?

Q. Yes.

A. Yes, that's correct.

Q. So it is to the advantage of the individual subscribers [fol. 126] to have as many subscribers in the organization as possible so as to keep down the losses?

A. No, I wouldn't say that. That is not necessarily true at all. Once you have a spread—of course insurance, as you know, is based upon the law of averages. Once you get a sufficient spread the more subscribers or the more risks you add does not produce any different result. The law of averages is at work. Now, of course, if you have two subscribers and a loss occurs, why, that doesn't perhaps reflect what the true law of averages for that particular kind of property is. But if you have got a number—we'll say roughly six, seven or eight, nine hundred or a thousand—why that will give you the proper spread so that you will get the law of averages. But once that is established I don't see that it matters whether there are a lot or few just so long as you have enough to give the proper spread.

Q. But supposing you pick your prospective subscribers very carefully, the more you have the distribution naturally of the loss would be less to each subscriber?

A. The distribution of one particular loss, yes, would be less. But, of course, the more subscribers you have the more likely you are to have more individual losses. So in the aggregate the total number of losses it would run based on the law of averages changes the same in point of net cost, but the more subscribers you have the less any one particular loss would be, but there would be more particular losses the more subscribers you have under the average of the possibility of one plant burning.

[fol. 127] The Court: In other words, when you get your spread it doesn't make any difference whether you have ten thousand beyond that?

A. No, it doesn't matter.

The Court: You will get your percentage, your average, and when you get beyond that it wouldn't make any differ-

ence how many more you had, there wouldn't be any less loss?

A. That's correct.

Q. You say that the attorney in fact decides with the advisory committee whether a certain prospect should be accepted into the organization—is that right?

A. Yes.

Q. Now, is the determination made by the attorney in fact upon the recommendation of the advisory committee or must he have the consent of the advisory committee before he may accept a subscriber?

A. He is not required to have the consent.

Q. It is merely in an advisory capacity?

A. In an advisory capacity.

Q. These individuals that are advisors as indicated in your report——

A. (Interrupting): I know the ones you refer to.

Q. Your annual report, Exhibits 14 and 15, indicate that these so-called advisors live at various points throughout the United States? In other words, they're not at Chicago?

A. No.

Q. So that would you say that in every case where a subscriber or a proposed subscriber makes an application for this type of insurance that these advisors pass upon the prospect?

A. At the time, no. That would be impractical. It would require their being present in Chicago all of the time. These men have their own businesses to handle. There [fol. 128] are three meetings a year of the advisory committee and the advisors, at which time the attorney in fact or the agent submits to them a list of any new subscribers which have come in since the time of the last meeting and asks for their opinion as to these new subscribers; and if the advisory committee feels that they are not proper people to be subscribers they're cancelled out, as the expression is. You understand what I mean by cancelled out.

Q. That is, they cannot subscribe to the plan?

A. They are retired.

Q. So that the attorney in fact could without the intervention of the advisors pass upon the suitability of a subscriber?

A. Yes, it is his responsibility.

Q. Therefore the nature of the prospect insofar as safety is concerned would be a factor which would depend upon the judgment of the attorney in fact.

A. It would depend upon his judgment, yes.

Q. Absolutely?

A. I beg your pardon?

Q. Solely upon his judgment?

A. I wouldn't say solely because he is conferring with the members of the advisory committee at their meetings; if any question arises he consults with subscribers that we have known for years that have been subscribers for, say, twenty or thirty years; we ask them their opinion not through any attempt to avoid any responsibility but as an attempt to get at the truth of whether or not these subscribers are proper. We want to have the very best subscribers, the best possible risks and the way to do that is to consult with the subscribers who are then exchanging these [fol. 129] contracts as to whether in their opinion they feel that it is wise, and therefore you see it is not the agent solely.

Q. Therefore it would be to the interest of the individual subscribers to have an efficient attorney in fact?

A. It would, yes.

Q. And to that extent the individual subscribers are dependent upon the attorney in fact?

A. They look to him. They appointed him their attorney in fact and placed their confidence in him. Each subscriber has so done when he signs the appointment of agent and power of attorney.

Q. And would you say that each of the individual subscribers is dependent to a certain extent upon the other subscribers to keep down his losses?

A. Yes.

Q. So that there would be some community of interest as between these subscribers?

A. Each has an interest, of course, in keeping down his own loss and each has an interest in seeing that losses paid any other subscriber are low, because the lower losses in general are the less his insurance will cost him.

Q. Now, you said on your direct examination that there is no entity in connection with this plan; what did you mean by entity?

A. I mean by entity that there is no corporation or partnership. I am speaking now of the subscribers. Of course, Lansing B. Warner, Incorporated, the attorney in fact, is a corporation of the State of Illinois. The subscribers are individuals, partnerships and corporations scattered throughout the United States and in Canada that are exchanging these inter-insurance contracts through the medium of the attorney in fact, Lansing B. Warner, In-[fol. 130] corporated, each subscriber having appointed Lansing B. Warner, Incorporated, his agent, or his attorney in fact by these documents, the power of attorney and appointment of agent; but there is no contract signed between each of the subscribers, there is no corporate entity certainly, there is no charter, there is no partnership between these subscribers, there is no association. They are simply individuals, partnerships and corporations that have all appointed by a similar document the same attorney in fact.

Q. In the legal sense there is no partnership or corporation association but these individual subscribers are grouped as one group for their mutual interest and benefit—is that right?

A. What do you mean by grouped as one group?

Q. Well, you said that the individual subscriber subscribed a certain amount of his deposit to cover the loss of other subscribers in the group?

A. Each subscriber authorizes Lansing B. Warner, Incorporated, to sign the name Canners Exchange Subscribers at Warner Inter-insurance Bureau to the policy and he has adopted that name as his name in connection with the exchange of these contracts. Otherwise it would become necessary to attach, say in Warner Reciprocal Insurers, two thousand one hundred names to each contract and that, of course, is impractical.

Q. That's what I'm tryi. g to bring out—that there is a community of interest between the various subscribers?

A. Yes, you can say that much of them.

Q. The only way that can possibly operate to cover the [fol. 131] losses is by a grouping of individuals as firms—is that right?

A. They all use the name Warner Reciprocal Insurers in connection with the policies.

Q. What do they accomplish by grouping together? In other words they get cheap insurance—isn't that right?

A. By inter-insuring among themselves they lower the cost that their insurance would cost them if it were with a stock insurance company.

Q. And that can only be done by a grouping of these subscribers by a community of interest—is that right?

Mr. Trueblood: I object to that, your Honor.

Mr. Kiebala: I'm trying to find out.

The Court: I think perhaps that's for this Court to say as to whether that is a community of interest. You have a statement of what they do. He doesn't agree with you.

Mr. Kiebala: I want the witness's statement as to whether there is a community of interest here because that's a very important point in this lawsuit. If there is it's a justification for supervision by the Insurance Department. If we can show a public interest by a grouping of individuals or corporations in a common scheme, then the question immediately comes up is there a public interest.

The Court: Now, that's one of the questions you are going to brief. Go ahead with your witness.

[fol. 132] Q. How long have you been connected with this organization, Mr. Cate?

A. About three years.

Q. About three years? And most of these matters that you recount about the history and—at least the history of this organization is what you heard?

A. It is what I have seen in examining the files and the records.

Q. Now, did you at any time take part in any field work, interviewing prospects?

A. I have seen, I think, one or two, yes.

Q. Have you seen any in the State of New York?

A. I don't recall seeing any.

Q. Now, you say that there are about ninety-three subscribers in the State of New York to the Canners Exchange?

A. Yes.

Q. In the State of New York ninety-three. You say there are about two hundred thirty subscribers to the Warner Reciprocal Insurers? Now, these are both fire insurance?

A. Yes.

Q. Could you tell me how long these people have been subscribing to this plan?

A. They vary, of course. Some of them have been subscribing many, many years others have been in, we'll say, a short time—a year, two years, three years; some of them have been in ten, fifteen years, twenty.

Q. Do you know when the first contract of that nature was made in the State of New York with either Warner or the Canners?

Mr. Trueblood: I object to that because the evidence shows that there has never been any contract made in the State of New York.

Mr. Kiebala: I'll change my question.

[fol. 133] Q. Can you tell in what year a subscriber—the first subscriber in the State of New York, subscribed to this plan with either the Warner's or the Canners?

A. I can't answer that definitely.

Q. Now, these prospects as they appear, you say that they generally write in for information to the Chicago office?

A. Either they or one of our present subscribers writes in.

Q. And following the request for information by you from the prospective subscriber, or the subscriber an investigator or engineer is sent to the prospect?

A. He calls on the prospect usually at the request of the prospective subscriber and talks with him, explaining our plan of insurance to him, explaining the qualifications that are required, the high physical hazard that is necessary and in general this plan of inter-insurance.

Q. In other words, he explains the operations and workings of this inter-insurance plan?

A. Yes, he explains it.

Q. He does not confine himself strictly to the physical properties in so far as the fire hazards are concerned but he goes on to explain how this plan operates?

A. Yes, he explains how the plan operates.

Q. Much in the same manner as an agent for an insurance company—when he inspect property he explains the insurance?

A. I don't think so.

Q. You just said he explains the workings of this plan?

A. The working of this plan; the working of this plan of carrying one' own insurance, of carrying these contracts of reciprocal insurance.

[fol. 134] Q. He does that in addition to examining the property?

A. Yes.

Q. So he is not only acting as engineer, he is acting as an agent in soliciting business?

A. No.

Q. What is he doing then?

A. If a subscriber wants to come in he must know what he would be signing with this power of attorney and appointment of agent; also the office in Chicago, if a subscriber wants to come in, must know the physical characteristics of the property; we must know what kind of a man or what kind of a company is applying to become a subscriber. We must be very careful as to the physical hazards and the moral hazards of the prospective subscriber. That's the basis of the plan, to keep the risks as low as possible.

Q. And that was all done in the State of New York with respect to a prospect in the State of New York?

A. The determination of whether or not a man will be accepted, that must be done at the office of the attorney in fact in Chicago.

Q. But the investigation of his moral character, his financial responsibility, the physical features of the risk and the explanation of the plan takes place in the State of New York?

A. Sometimes but all of that does not, you see. The answer to that question is no because all of it doesn't.

Q. Well, which parts are?

A. The property—you are speaking about a New York property—the property being here, of course, our man must come into New York and look at that piece of property in New York and he sees it there and then he reports to us in [fol. 135] Chicago. There we secure a credit report regarding the man; we write to our subscribers, some of whom are in New York, or to any of our subscribers that may know him and find out what their opinion is.

Q. Do you write to the banks in the State of New York?

A. Sometimes we do and ask their opinion.

Q. And you also write to the subscribers to find out about the moral qualifications of the individual?

A. We do.

Q. So that your information regarding the prospect is obtained in the State of New York?

A. Part of it comes from the State of New York.

Q. The moral, physical inspection and the financial. Now, what else is there?

A. The moral risk is——

Q. (Interrupting.) You get that by writing to the subscribers in the State of New York?

A. And other subscribers. Now, take for instance in Canners, the canning industry so far as numbers is concerned is a relatively small industry. There are not so many canners, and the canners of the United States know each other pretty well. The canners in the State of California are familiar with the canners in the State of New York, Wisconsin, Indiana; they all know each other. We can determine a great deal about a New York canner by writing to California or to Wisconsin and determine what they know about this particular canner. In the normal course of his business they have undoubtedly run into deals being made, know how he sells his goods, where he buys his cans. They can tell us a great deal regarding that man, sub-
[fol. 136] scribers in other states. It isn't necessarily in the same state in which a prospective subscriber resides.

Q. But he writes the person under view on the moral character of the prospect, who might be a resident in New York, so there is always a possibility that the moral—including any one related to him—the moral qualification may be obtained in the State of New York?

A. It is possible, yes.

Q. Now, after this information is obtained it is sent by the engineer, as you call him, to the office in the City of Chicago?

A. Yes.

Q. And there it is passed upon by whom?

A. It is passed upon by the officers of the attorney in fact working, of course, with other employees to determine whether or not the subscriber or prospective subscriber is qualified to exchange this inter-insurance and whether or not it would be wise from the standpoint of the other subscribers to accept him.

Q. And if this application reaches Chicago at a time when it is not practical to have the advisory committee there will the attorney in fact accept the prospect without consulting with the advisory committee?

A. The responsibility is in the agent, and if the agent thinks after this exhaustive examination has been made, if

he feels that he would be a proper subscriber, yes, he would be accepted.

Q. And then an application is sent to the prospect?

A. No, that is upon an application of a prospective subscriber.

Q. Then a report is submitted by the engineer?

[fol. 137] A. The application is forwarded to the prospective subscriber upon learning that he is interested in becoming a subscriber.

Mr. Trueblood: Is that by mail?

A. That is by mail from Chicago. The application is sent to the prospective subscriber and he then sends it in to Chicago together with the power of attorney which has been given to him.

Q. Oh, the power of attorney accompanies the application?

A. Yes.

Q. Now, at this point does the power of attorney when it reaches Chicago—is it executed by the attorney in fact there or is it sent to the applicant partly completed?

A. No. The answer to that question is that it is never sent to the applicant partly completed.

Q. In other words he is the first to enter his signature and then it is sent to Chicago?

A. It is sent to Chicago.

Q. So it is completed in Chicago?

A. Yes. The determination as to whether or not he will be accepted as a subscriber is made in Chicago.

Q. So that the application and the blank power of attorney is sent to the prospect?

A. Yes.

Q. At one and the same time?

A. Yes.

Q. And then that is forwarded back by the prospect to the Chicago office?

A. I didn't quite get that.

Q. The application and the power of attorney executed by the prospect is sent to the attorney in fact in Chicago?

A. Yes.

Q. And he completes the transaction by accepting the power of attorney?

A. By accepting or rejecting.

Q. Assuming that he accepts, then the attorney in fact does what following that?

[fol. 138] Mr. Trueblood: Wait a minute. Pardon me. Is that power of attorney ever signed by the attorney in fact?

A. No, it is not signed by the attorney-in-fact. It is accepted or rejected, but no physical mark is entered.

The Court: I think we will take a five-minute recess at this time.

(Recess taken.)

The Court: Mr. Kiebala informs me that his view has changed since we got into the case and he would like to recess until tomorrow morning.

Mr. Trueblood: Mr. Cate is very anxious to go back to Chicago on account of this death in the family.

The Court: This is an important case to all parties concerned—that is the view of the Court—and he feels he would like to discuss this with his superiors tonight. He certainly could not finish with the witness this afternoon and he would prefer to recess at this time.

Mr. Trueblood: That is perfectly satisfactory to me.

The Court: We will do that. We will adjourn now until tomorrow morning at ten o'clock.

(Adjournment taken to Wednesday morning, March 27th, 1940, at ten o'clock.)

[fol. 139] Morning session, March 27th, 1940.

Counsel (Mr. Olsen, Mr. Trueblood and Mr. Kiebala) all present.

Arlindo S. Cate, recalled, testified as follows:

Cross-examination.

By Mr. Kiebala continued:

Q. Just before court adjourned yesterday, Mr. Cate, I believe we were discussing the manner or the method in which a prospective subscriber becomes a subscriber to either one of these two systems, either the Warner Reciprocal or the Canners Exchange—is that right?

A. It is.

Q. To go over briefly some of the statements made in that connection I believe you said that the request for membership in these organizations is either by a request sent by the prospective subscriber or upon recommendation by some other subscriber in the state or elsewhere—is that right?

A. The particular prospective subscriber, of course, must make a request. Some one else can't make the request for him that a contract of inter-insurance be issued to him. It must be at his request.

Q. I am not speaking of the application. I mean supposing there would be a subscriber in the State of New York who had knowledge that there was a prospective subscriber, would he write to the exchange and ask them to send this prospective subscriber the necessary information in connection with it and the application blanks and other blanks?

A. Well, the way that is done the present subscriber—[fol. 140] we will distinguish the two as the present subscriber and the prospective subscriber—the present subscriber would notify or discuss with the prospective subscriber and mention the plan to him, explain it to him, and the prospective subscriber would notify the office in Chicago that he would like to know more of the plan.

Q. Then in response to this request sent in by the prospective subscriber the exchange sends an application blank to the prospective subscriber—is that right?

A. An application blank, yes.

Q. And that is executed by the applicant?

A. Yes.

Q. And sent back to Chicago?

A. Yes.

Q. And then what happens?

A. Then the attorney in fact or the agent——

Q. (Interrupting): Who?

A. Or the agent, Lansing B. Warner, Incorporated—Lansing B. Warner is agent for Warner Reciprocal Insurers—receives the application blank. He then makes the examinations which I went into yesterday.

Q. What are those?

A. He secures a credit report, he writes to various subscribers that he thinks will know the prospective subscriber or will know of him, and from the various material at his command he makes his decision as to whether or not this prospective subscriber can qualify to the qualifications

that are required of all subscribers, whether he can meet the requirements that are made for all subscribers.

Q. Now, this investigation is made entirely from the City of Chicago?

A. Well, we write to subscribers outside of Chicago, of course.

Q. That might be to some in the State of New York?

[fol. 141] A. Yes, that might be to someone in New York.

Q. Would you have anybody in the State of New York, who might personally seek this information, any person in the State of New York?

A. Our engineer explains the plan to the——

Q. (Interrupting): Before we get to that point, would you say that the engineer as you call him—would he seek information relative to the financial standing and morals of the prospective subscriber in the State of New York?

A. The engineer——

Q. (Interrupting): Would he? Would he do that?

A. I think not, no.

Q. That is, he wouldn't go to the banks in the State of New York to get the financial standing?

A. I don't think the banks would give that to one of our men.

Q. But as to moral standing?

A. Now, what do you mean by the moral standing?

Q. You used that word "moral."

A. I explained that we use the term moral hazard. By that we mean the housekeeping—the housekeeping, we'll say, for instance of a canner. By housekeeping I mean does he keep the weeds and the grass around his plant cut; suppose there's a railroad siding, of course, there's a danger of sparks setting fire to grass, while if the subscriber or prospective subscriber has the grass cut there is not nearly so much danger of a fire coming from the sparks of an engine. Now, the engineer looks into those things.

Q. The engineer would make inquiries concerning these physical matters you speak about at the point of risk?

A. He would be compelled to look at them at the plant. [fol. 142] That is the only place you can see them. That is, at the plant he would be compelled to look at the property to determine its physical characteristics.

Q. So the question of the moral risk is investigated by the insurance engineer sent from Chicago?

A. You say moral risk. I am referring to the moral hazard. Yes, that is correct.

Q. Now, these engineers that you speak about, do they all work out of the City of Chicago or have you some situated here in the State of New York?

A. All of our men work out of Chicago. There are quite a few risks within the State of New York and I would say part of the time there are some of our engineers examining property in the State of New York.

Q. They have no separate office here?

A. No.

Q. Where they receive any mail from prospective subscribers?

A. Each of our engineers notifies the office each day where he may be located. Of course, we have to know where all of our representatives are to locate them, and they all file a report each day notifying us where they are and where their next address will be.

Q. Now, supposing for example that one of your engineers is investigating a prospect in, say, the Rochester area, and that he takes up his residence for the time being at the Hotel Seneca in Rochester; does he receive any communications from this prospective subscriber at the hotel with respect to this particular risk?

A. Suppose he has talked to a prospective subscriber the day before and he is going back there the next day to continue, why, the prospective subscriber might call him at the hotel, of course.

[fol. 143] Q. Now, when this engineer calls on a prospect would you say that his activity is confined solely to the inspection of the moral hazard and the physical nature of the risk to be insured?

A. I would go a little further than that. I would say that he explains the plan.

Q. The workings of the reciprocal insurance or the inter-insurance plan?

A. Yes, he explains the plan.

Q. So this person will know what he is subscribing to?

A. Well, of course, he will want to know what——

The Court (Interrupting): Wait just a minute, please.

Q. Would you say, Mr. Cate, that in no case, in no instance that you know of, the insurance engineer inter-

viewed and explained the workings of this plan before an application had been submitted to the Chicago office by this prospective subscriber?

A. Would you state that again?

Q. Do you know of any case where a prospective subscriber was interviewed by one of your engineers before this prospective subscriber had sent an application to the Chicago office?

A: I suppose that has happened, yes.

The Court: Well, the question is: Do you know of any such instance personally yourself?

A. Offhand I do not.

Q. Would you say that that has been done in connection with your business?

A. It is quite possible that it has happened. I don't know of an instance where it has happened.

Q. But it could be done under the workings?

A. It is possible.

[fol. 144] Q. It is not prohibited for an agent to interview a prospective subscriber before an application is sent to the Chicago office?

Mr. Trueblood: If your Honor please, I object to the word "agent." There is no agent.

The Court: Take out the word "agent" and I'll permit the question.

Mr. Kiebala: Engineer.

A. No, and often one of our present subscribers after speaking to a prospective subscriber notifies the office of it and our representative will call on the man and state that such and such a subscriber has asked him to call and to explain this plan of inter-insurance and the present subscriber has spoken to the prospective subscriber about it.

Q. But after such an interview the subscriber may then make his application?

A. To Chicago.

Q. And yesterday you said that both the application and the executed appointment of agent were in Chicago before there was an interview by the engineer?

A. I don't believe I said so.

Q. Would you say there was any instance where the appointment of agent was signed by the prospective sub-

scriber at the request and in the presence of the engineer at the location of the risk?

Mr. Trueblood: Now, I object to that question, your Honor, as assuming a fact not in evidence.

The Court: What is the question?

(Preceding question read from record.)

The Court: What is your objection?

Mr. Trueblood: The objection is that it assumes an ap- [fol. 145] pointment of agent has been signed at the request of the insurance engineer, and he follows it up and says at the place of the risk.

Mr. Kiebala: In the State of New York.

Mr. Trueblood: That is a double question there.

The Court: I am going to permit the question. Overruled. Go ahead.

A. The appointment of agent, of course, is usually signed at the office of the prospective subscriber who desires to obtain these inter-insurance contracts. Undoubtedly sometimes it is signed when our engineer is present. The prospective subscriber wants a complete explanation, asks us for a complete explanation of the plan, and our representative explains the entire plan of inter-insurance to him.

Q. As a result of this explanation the prospective subscriber makes an application which he forwards to Chicago——

A. (Interrupting): I don't say it is——

Q. (Continuing) —and he may at the same time execute a power, an appointment of agent, on the blank or form given to him by the insurance engineer—is that right?

A. The power of attorney and the application have come from Chicago.

Q. Well, don't you know of any instance where the power of attorney or the appointment of agent, as you call it, is furnished to the applicant by the engineer rather than from Chicago?

A. Well, the rule on that is to furnish the application and the appointemnt of agent from Chicago.

Q. Well, don't the insurance engineers carry these forms [fol. 146] with them when they interview these prospects?

A. All of our representatives have a copy of the appointment of agent and the power of attorney because that is the

sole authority for the actions of Lansing B. Warner, Incorporated. The power of attorney and the appointment of agent—they set out the plan, they are the detailed outline of the entire plan, and it is necessary, of course, that they have those. They have a copy with them.

Q. What I am trying to bring out is that it isn't necessary for a prospective subscriber to write to Chicago for the form of appointment of agent, that is furnished to him if he requests by the insuarnce engineer?

A. Well, Chicago must know of all of this.

Q. I am asking you does the insurance engineer furnish this appointment of agent blank to the prospective subscriber for his signature?

A. That is furnished from Chicago.

Q. In other words, you know of no instance wherein the insurance engineer himself has delivered to a prospective subscriber an appointment of agent to be signed by him?

A. I know of no such instance. It may have occurred.

The Court: Let us keep our record straight. If you know of any instance such as that, just say so. Just answer the question. Don't crowd it up by saying it may have occurred.

Mr. Trueblood: I move that it be stricken out.

The Court: Let us keep the record as clear as we can.

Q. Is there any prohibition anywhere in the rules or regulations of the exchange of these reciprocals which would [fol. 147] prohibit an insurance engineer from furnishing such a blank to a prospective subscriber?

A. No.

Q. So that if he did have a blank with him he might leave it with the prospect?

A. Yes.

Q. And that blank might be signed and executed and sent to Chicago?

A. Yes.

Q. And you say in that in each instance the appointment of agent is actually executed in the State of New York?

A. I don't know that, no. Many of the powers of attorney, say of the canners, were executed in Chicago at the time of the Canners Convention which is held there each year, so that to say that all of them are executed in New York I can answer that definitely no.

Q. When that form is furnished to the subscriber and he affixes his name, there is nothing further to be done in connection with the execution of that appointment of agent, you stated yesterday that the agent does not sign in Chicago?

A. The agent has to accept or reject that appointment of agent, and if he accepts it, of course, a contract of inter-insurance follows upon the request of the prospective subscriber before he becomes a subscriber, but the agent or attorney must accept it in Chicago.

Q. You say accept; do you mean that he notifies the subscriber formally that he has accepted his appointment of agent?

A. Yes.

Q. Have you any such form in your records here to show?

A. We write a letter to him and the contract of inter-insurance follows.

Q. Now, upon the receipt of the appointment of agent, supposing that the prospect is satisfactory in so far as his [fol. 148] qualifications are concerned, what is the next step?

A. You say assuming that his qualifications are met?

Q. Yes, assuming that he has executed the appointment of agent and sent that to Chicago and it has been accepted by the agent, what follows?

A. And the application has been sent in?

Q. Yes, of course, that preceded.

A. Then a contract of inter-insurance is prepared there at the office of the agent or attorney in Chicago and is mailed to the then subscriber.

Q. When you speak of a contract of inter-insurance you speak of a form such as Plaintiffs' Exhibit 7?

A. I will have to see it.

Q. That is in connection with Warner Reciprocal Insurers?

A. This is the complaint, is it?

Q. Yes, that is one of the exhibits.

A. Yes.

Q. You call this a contract of inter-insurance?

A. I do.

Q. Would you say that this is a policy of insurance?

A. The word "policy" appears on it. It is a contract of inter-insurance.

Q. And this contract of inter-insurance or policy as you state it is conveniently called provides that in consideration of certain stipulations herein named and of the exchange of insurance between insurers of Warner Reciprocal Insurers it severally insures—and the name of the subscriber, is that right, goes into the form?

A. The name of the subscriber.

Q. For a term of so many years or months stating it from such a date to such a date?

A. To such a date.

Q. Against all loss or damage by fire in an aggregate not exceeding the amount whatever it may be—a hundred thou- [fol. 149] sand dollars or fifty thousand dollars, whatever the amount may be in the policy—and then the description of the policy—the description of the property?

A. Yes.

Q. Now, you say the amount is—say the amount is one hundred thousand dollars as set out in this contract of inter-insurance, you mean the amount of indemnity, the coverage?

A. Yes, the amount of indemnity, the coverage.

Q. Wouldn't you say that the subscriber having received or being assured a coverage of one hundred thousand dollars against loss by fire that he is considered the insured?

A. In reciprocal insurance the subscriber stands in a dual capacity. He is both the insured and the insurer.

Q. But he is an insurer?

A. He is an insured and insurer.

Q. But he is an insured besides being an insurer?

Mr. Trueblood: Well, I object to that.

The Court: What is your question now?

Mr. Kiebala: I asked the witness if in view of the provisions of this contract of inter-insurance or policy the subscriber, as they call him, would be considered the insured. I want an answer yes or no.

A. He is both insured and insurer.

Q. If he is both then he is insured?

A. Yes.

Q. Now, in order to be insured there must be an insurer —is that correct?

A. He is the insurer and the insured.

Q. Well, now, when he is the insured he is not at the same time the insurer?

A. He is, precisely.

[fol. 150] The Court: Now, you are just arguing with the witness, I think, General. He has answered it.

Q. The point I'm trying to bring out, when a certain concern in the State of New York is covered by one of these contracts to the extent of a hundred thousand dollars, that particular concern is insured by someone to the extent of a hundred thousand dollars?

A. He is insured by all of the subscribers, which includes himself. In the illusion I gave yesterday of three subscribers, to take a simple example, three subscribers each with one hundred dollars on deposit in Chicago and we'll say a loss of thirty dollars occurs on the property of A. Then A pays ten dollars on that loss, B pays ten dollars and C pays ten dollars, equalling the thirty dollars in total.

Q. But in addition to the insured being an insurer there are others who are insurers of his risk?

A. All of the subscribers are insurers of all risks.

Q. So that you have an insured and you have the insurers?

A. Well, each insurer is an insured, and each insured is an insurer as to his own property and other properties.

Q. But what I'm trying to bring out, Mr. Cate——

Mr. Trueblood (interrupting): I object to that, if the Court please.

Mr. Kiebala: What's your objection? I haven't stated my question.

Mr. Trueblood: You are just arguing.

[fol. 151] The Court: Well, state your question. I think you are just arguing with the witness. I think it is plain to the Court what he means. You may differ with him but let's have what the record will show.

Q. Would you say, Mr. Cate, that this contract of insurance was a contract of insurance within the definition of the laws of the State of New York?

A. It is a contract that has been approved by the Superintendent of Insurance in the State of New York.

Q. There was some question yesterday put to you with regard to the effect of the provisions of the 1939 Insurance Law, one of those being that there is a requirement that your contract of insurance or policy should contain the standard fire provisions of the State of New York, and you stated that if that was—that if your organization was re-

quired to do that, that it would upset entirely the scheme of this plan?

A. The balance of the plan, yes.

Q. Do you know of any reciprocal insurers in the State of New York that are doing similar business to that done by the Warner's or the Canners?

A. That depends on what you mean by similar.

Q. Would you say that the Ernest Brown Company of New York City or the Associated Reciprocal Exchanges do business somewhat similar to the business done by your concern?

A. Now, you come into a question of degree: I know about Mr. Ernest W. Brown's company which is attorney in fact for several exchanges in the State of New York, and we know of Mr. Brown and feel that he is a very fine man.

Q. Do you know, Mr. Cate, of your own knowledge, that [fol. 152] the Associated Reciprocal Exchanges have a contract which complies with the regulations and laws of the various states with respect to standard provisions in insurance policies?

A. No, I don't know.

Q. The provisions and stipulations which are set out as a part of their policy are these standard provisions required by the State of Illinois?

A. I don't quite understand.

Q. On the back of the policy are set forth stipulations and conditions which are made a part of this policy; are those the standard form provisions required by the Code of Illinois?

A. Our Illinois contract—our Illinois contract of interinsurance covering Illinois property is set out there, yes.

Q. That is Exhibit No. 8?

A. May I see it?

Q. That's the Illinois?

A. Yes, that's correct.

Q. Now, Exhibit No. 7, which you stated was for use outside of the State of Illinois, there are certain conditions and stipulations on the back of the policy; where are those taken from?

A. They were the ones which we have been using since the beginning of the exchange of these contracts.

Q. So that in the State of Illinois you follow the requirements of the statutes and outside of Illinois you adopt your own form to suit your own convenience?

A. The forms are approved by the Superintendent of Insurance.

Q. That is not the form which is required by the standard provisions of the Laws of the State of New York?

A. We have adopted the form approved by the Superintendent of Insurance for the State of New York.

Q. You mean under the Laws of 1939?

[fol. 153] A. Under the laws of—we were admitted in 1930 and have filed copies of that contract of inter-insurance every year thereafter.

Q. You stated yesterday that you would object to following out the provisions of the Law of the State of New York with respect to the standard provisions as to fire policies?

A. If they compel us to use such words as company that are entirely inapplicable to this type of insurance. There is no such thing as a company here.

Q. But you are willing to comply substantially with the provisions of the New York law?

A. We are.

Q. Except for changes in certain words to correspond with the scheme with which——

A. We are anxious to provide equal protection for all of our subscribers. This plan is based upon seeing that all of our subscribers are paid in full, and that form of contract that brings about the greatest equity among subscribers, that brings about the fairest and best payment of claims, that is the form we want to adopt. We have submitted our forms to the superintendents of the states in which we are licensed and they have approved these forms and we are abiding by the approval that the superintendents of other states as well as of the State of New York has given these contracts.

Q. Categorically, Mr. Cate, you stated that you had objections to various provisions of the 1939 Insurance Law of the State of New York because it would have the effect of breaking down this scheme or plan of inter-insurance; is that an opinion or have you found that out in practice?

A. That is an opinion.

[fol. 154] Q. In other words these statutes have not been made to operate as against your—against the Warner Reciprocal and Canners Exchange?

A. No, because that is why we brought this action to prevent their application to us. We feel that the effect of

it would be disastrous and that's our reason for bringing this action.

Mr. Kiebala: I think that will be all.

Re-direct examination.

By Mr. Trueblood:

Q. These exhibits, Plaintiffs' Exhibits 8 and 10, are known as new New York standard forms, are they?

A. Yes.

Q. And are those the forms that you have referred to in your cross examination as being used in the State of Illinois?

A. That is correct.

Q. And point out to the Court what changes, if any, have been made in those forms to adapt them to the usage of the reciprocal insurance of Canners Exchange and Warner Reciprocal Insurers.

A. That would be rather detailed.

Q. Well, don't state what it would be. State what changes have been made briefly, the paragraphs that have been changed.

A. At the top of the page there is the name Warner Reciprocal Insurers; then it describes what Warner Reciprocal Insurers are, it says being individuals, partnerships and corporations and so forth, describing who the Warner Reciprocal Insurers are; then it makes a statement of the special condition of the policy, stating the liability assumed of the several insurers, which is incorporated with the power of attorney and appointment of agent. Then throughout the terms and conditions the word "company" [fol. 155] of course has been stricken, there being no company, and the word "insurers" or "subscribers" inserted and the various changes which make it—which are necessary to adapt this to the plan of the Warner Reciprocal Insurers and in like manner Canners Exchange Subscribers.

Q. Which exhibit did you refer to a moment ago? Give the number of the exhibit.

A. This is Plaintiffs' Exhibit 8.

Q. It is the Warner Reciprocal Insurers contract?

A. That's right, and Plaintiffs' Exhibit 10 is the Canners Exchange.

Q. And do you say that substantially the same changes have been made in relation to Plaintiffs' Exhibit 10 as you explained have been made to Plaintiffs' Exhibit 8?

A. That is correct.

Q. And for the convenience of the Court what is the provision of new New York Insurance Law in reference to the use of the new New York standard form?

A. I don't quote follow you.

Q. What does the new New York Code provide in relation to the use of the new New York form?

A. It provides that it shall be—is it identical—in all—I can't remember the exact language. It shall conform in all particulars to the New York form.

Q. Now, throughout your cross examination you referred to or used the pronoun "him" in speaking of the agent; by that pronoun did you mean the corporation, Lansing B. Warner, Incorporated?

A. Wherever I have referred to the agent or the attorney I mean the agent, Lansing B. Warner, Incorporated, [fol. 156] and the attorney in fact, Lansing B. Warner, Incorporated.

Q. And I don't believe it was quite clear as to what you meant yesterday by use of the phrase "cancelled out." Will you explain that briefly to the Court?

A. The agent or the attorney reserves the right when he feels—if some change in the physical hazard has occurred or any other change which may make the particular subscriber undesirable as a subscriber the agent may notify him that he may no longer continue as a subscriber, and that is referred to as "cancelling out" and it is a cancellation of his contracts of inter-insurance.

Q. And do you have or did you state your opinion—I am not sure that you did—as to the necessity for the uniformity of the provisions of all powers of attorney and appointments of agent?

A. I stated. I stated that it is absolutely necessary that the rights and the obligations of the subscribers everywhere be the same.

Q. And I don't think this is clear: What relation generally speaking does the amount of the deposit required by either one of the groups bear to the size of the premium charged by all old line insurance companies?

A. I stated yesterday that it usually is approximately the same amount.

Q. Now, I want to ask you two or three questions about the contract of inter-insurance. Now, in the experience of Lansing B. Warner, Incorporated has it ever been necessary for either group or for the attorney in fact to require a subscriber to furnish verified plans and specifications of any building, fixture or machinery destroyed or damaged?

A. It has not.

[fol. 157] Q. And has it ever been necessary by either of said groups or by the attorneys in fact to require a subscriber to furnish a certificate of the magistrate or notary public living nearest the place of fire stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that said magistrate or notary public shall certify either in whole or in part, in substance?

A. No.

Q. And has it ever been necessary or has it ever been required by the attorney in fact or by either group to require any subscriber to submit to examination under oath by any person named by the agent?

A. No.

Q. And has the attorney in fact or either group of subscribers ever recovered a judgment or other sum by reason of any subrogation arising out of a risk located in New York?

A. No.

Mr. Trueblood: I believe that is all.

The Court: Any questions?

Mr. Kiebala: May I ask one question, please?

Re-cross examination.

By Mr. Kiebala:

Q. Isn't it a fact, Mr. Cate, that the question of the financial responsibility of the prospective subscriber is determined before the insurance engineer is sent to inspect the risk? In other words, if you are sure that the prospective subscriber is not a worth while financial risk you're not going to the expense of sending an engineer there to inspect the property, are you?

A. Of course if we know that someone may not be a subscriber we are not going to send anyone to look at his property.

[fol. 158] Q. Isn't it the general practice to inquire into the financial responsibility of a prospective subscriber before any inspection of the property is made?

A. No, I wouldn't say so, no.

Q. But it is done in some cases?

A. It might be but I don't know of any.

Q. When a loss is sustained where is payment made of the loss?

A. Payment is made in Chicago.

Q. That is, the check is filed in Chicago?

A. Mailed from Chicago.

Q. And if it is necessary to—as you state in connection with a larger loss there's a dispute as to the amount of the loss an adjustment is made where—at Chicago?

A. At Chicago.

Q. And who from your office, if anyone, comes to the State of New York to appraise or inspect the loss?

A. We don't send anyone to appraise. We sent inspectors to investigate. As I explained yesterday we want to prevent every possible fire that we possibly can and we want to——

Q. (Interrupting) This is after a fire?

A. Yes, that was what your question was directed to.

Q. Who do you send? Do you send an engineer or an inspector?

A. Usually we send an engineer when one is sent. Now of course this is an unusual thing. We investigate all of our subscribers and we know who they are. The amount of the losses are usually small; on the overwhelming amount of the losses a notice comes in to us and we pay the loss.

Q. I'm asking you about the unusual loss.

A. In a very unusual loss an inspector from our office will come along and look at the property and he will go into the [fol. 159] ruins of the fire and examine the wiring, what is left of it, or what is left of the building to see if he can determine what caused that fire.

Q. And then does he send a recommendation to your Chicago office as to the amount?

A. He returns to Chicago.

Q. Oh, he returns?

A. Yes.

Q. And recommends certain——

A. He advises the agent or attorney in fact there as to what he saw at the particular loss. Now, the subscriber has on file with us, which he has sent to us, the amount of stocks and so forth that he had in the particular warehouse, we'll say, that burned, and the agent or attorney draws a check and mails it to the subscriber.

Mr. Kiebala: Thank you.

By Mr. Trueblood:

Q. Has the attorney in fact or agent or either group of subscribers ever been sued as a result of or in connection with any loss during your thirty-two years of experience arising out of a property in the State of New York?

A. No.

Q. Have you ever had any serious controversy over the period of thirty-two years with any subscriber in the State of New York in regard to a loss?

A. No.

Q. I don't believe the record shows this: Is it necessary, after a power of attorney or appointment of agent has once been signed and accepted, to procure a new appointment of agent or power of attorney when a subsequent contract of inter-insurance is issued to the same subscriber?

A. No.

Q. But that power of attorney or appointment of agent [fol. 160] remains on file as a basis for renewal contracts from year to year?

A. Yes, unless it has been revoked.

Q. And over the years have either the appointment of agent or power of attorney been substantially changed or modified?

A. No.

Q. The documents in use today are the same as they have been for many years?

A. Oh, yes.

Q. And the experience of Mr. Warner and the attorney in fact have shown them to be best suited to the particular type and kind of insurance carried by these groups?

A. Yes.

Mr. Trueblood: That is all.

Mr. Kiebala: That's all.

The Court: We'll take a five-minute recess at this time.

(Recess taken.)

Mr. Trueblood: Your Honor, the plaintiffs rest.

Mr. Kiebala: Would it be necessary to introduce in evidence the old Insurance Law or will the Court take judicial notice of it?

The Court: I think the Court can take judicial notice of it. I see no reason why I shouldn't. Just make your request that the Court does take notice, so it will be on the record.

Mr. Kiebala: I ask that the Court take judicial notice of the so-called Insurance Law—generally there's a certificate of the Secretary of State; I don't see it—the Insurance [fol. 161] Law of the State of New York as it existed prior to the enactment of Chapter 882 of the Laws of 1939.

The Court: All right.

Mr. Trueblood: The plaintiffs, your Honor, join in that request.

The Court: All right. So there can be no question about it the Court will take judicial notice.

Mr. Kiebala: The defendants' case will be confined entirely to the introduction of certain exhibits. We have here—I don't think there is any objection—the annual statements for the years 1931 to 1938 inclusive of the condition and affairs of the Warner Reciprocal Insurers made to the Superintendent of Insurance of the State of New York. Will you mark these? Is there any question?

Mr. Trueblood: Only the bulk. If there is any way to put in representative statements of reports I think it would be better, but there is no objection.

Mr. Kiebala: What's the objection?

Mr. Trueblood: I say it's only to the bulk. If there is some way to put in representative statements over the years it would be better, but there is no objection as to the competency of the statements.

The Court: I don't see how it can be done.

Mr. Kiebala: If Mr. Trueblood wants to put in some time with me to reduce these things down——

The Court: Well, go ahead. Received.

[fol. 162] (The statements so received in evidence were marked Defendants' Exhibit A to Defendants' Exhibit H inclusive.)

Mr. Kiebala: And I'd like to introduce in evidence the annual statements for the years 1931 to 1938 inclusive of

the condition and affairs of the Canners Exchange Subscribers at Warner Inter-insurance Bureau made to the Superintendent of Insurance of the State of New York.

Mr. Trueblood: No objection, your Honor.

The Court: Received.

(The statements so offered and received in evidence were marked Defendants' Exhibit I to Defendants' Exhibit P inclusive.)

The Court: As I understand it, the defendants rest.

Mr. Trueblood: I think we may want to recall Mr. Cate for just one question about the annual statement in rebuttal.

The Court: All right.

ARLINDO S. CATE, recalled in rebuttal, testified as follows:

Direct examination.

By Mr. Trueblood:

Q. I show you, Mr. Cate, Defendants' Exhibit D being the annual statement of Warner Reciprocal Insurers filed with the Superintendent of Insurance of the State of New York covering the fiscal year 1938, page 9 thereof, and ask [fol. 163] you to define to the Court the heading at the top of the page entitled "Business in the State of New York during year." What is meant by that?

A. These are deposits made in connection with risks located in the State of New York for Warner Reciprocal Insurers.

Q. But that phrase "Business in the State of New York during year" has no relation to the place or manner of execution or delivery of the contracts of inter-insurance governing or touching the property in New York State?

A. All contracts of inter-insurance are delivered, issued—they're executed from Chicago.

Q. Well, answer that yes or no, will you, please?

A. In this state no.

Mr. Kiebala: I think that's a question of law for the Court.

The Court: Well, that's his opinion.

Mr. Kiebala: Counsel spoke to me about the necessity of oral arguments. I believe in view of the fact that we are required to submit briefs we can dispense with that.

The Court: I see no reason for oral argument at this time because in your opening you informed the Court what the case was about; you made it plain to the Court what the issue is. So you will file your briefs. That is most necessary.

Mr. Kiebala: Will the Court fix the time?

The Court: I'd rather give you your time.

Mr. Trueblood: I think we will take, if it is agreeable to everyone, not over three weeks. We will want to write up later a complete statement of the case. I assume your Honor will want that?

The Court: That's right.

[fol. 164] Mr. Trueblood: And the full authorities particularly in New York and the Supreme Court of the United States. How long will you want?

Mr. Kiebala: I think about that time.

The Court: Exchange your briefs and inform me. I will want the testimony and I assume you will too before you write your briefs. Of course I will want your exhibits.

Mr. Trueblood: Is there any requirement that they be left here at this time?

The Court: No, take all your exhibits and at the time that you submit your briefs I will want the exhibits.

Mr. Trueblood: Then we will prepare the briefs with the collaboration of Mr. Olson and send on the exhibits and he will file them together.

The Court: Very well.

[fol. 165] In Supreme Court of New York, Albany County

[Title omitted]

Requests to Find by Plaintiffs.

[fol. 166] The plaintiffs in the above entitled actions hereby request the Court to make the following findings of fact and conclusions of law:

Findings of Fact

1. The plaintiff Hoopeston Canning Co., was at all times hereinafter mentioned a corporation duly organized and

existing under and by virtue of the laws of the State of Illinois, with its principal place of business in the City of Hoopeston in said state; the plaintiff, E. Pritchard, Inc., was at all times hereinafter mentioned a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, with its principal place of business in the City of Bridgeton in said state, the plaintiff, Lansing B. Warner, Incorporated, was at all times hereinafter mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, with its office in the City of Chicago in said state; the plaintiff Harry M. Brown is domiciled in, and a citizen and resident of the State of New York; the plaintiff James T. Smith is domiciled in, and a citizen and resident of the State of Pennsylvania; the plaintiff, Paul E. Emerson, is domiciled in, and a citizen and resident of the State of New York; and the plaintiff Ben. A. Morton is domiciled in and a citizen and resident of the State of Tennessee.

Found. H. E. S., J. S. C.

2. The defendants, Louis H. Pink and John J. Bennett, Jr., are the duly acting and qualified Superintendent of [fol. 167] Insurance and Attorney-General, respectively, of the State of New York, and are sued in their official capacity.

Found. H. E. S., J. S. C.

3. The plaintiffs, Hoopeston Canning Co., E. Pritchard, Inc., Harry M. Brown and James T. Smith are representatives of approximately nine hundred seventy-six persons, firms and corporations who exchange contracts of inter-insurance under the designation of Canners Exchange Subscribers at Warner Inter-Insurance Bureau, approximately ninety-three of whom are in the State of New York, and all of whom would have been joined as parties plaintiff except that they are very numerous and that it was impracticable to bring them all before the court, and therefore plaintiffs, Hoopeston Canning Co., E. Pritchard, Inc., Harry M. Brown and James T. Smith, sued for the benefit of all.

Found. H. E. S., J. S. C.

4. The plaintiffs, Hoopeston Canning Co., E. Pritchard, Inc., Paul E. Emerson and Ben A. Morton, are representatives of approximately twenty-one hundred persons, firms and corporations who exchange contracts of inter-insurance

under the designation of Warner Reciprocal Insurers, approximately two hundred and thirty of whom are in the State of New York, and all of whom would have been joined as parties plaintiff except that they are very numerous and that it was impracticable to bring them all before the court, and therefore plaintiffs, Hoopeston Canning Co., E. Pritchard, Inc., Paul E. Emerson and Ben A. Morton sued for the benefit of all.

Found. H. E. S., J. S. C.

[fol. 168] 5. The persons, firms and corporations, referred to as Subscribers, exchange contracts of inter-insurance among themselves, as both insured and insurer, with several liability only, wherein they undertake to indemnify each other against loss or damage by fire and similar hazards through the medium of the Attorney-in-Fact or Agent, plaintiff, Lansing B. Warner, Incorporated, as attorney-in-fact appointed for the purpose by each Subscriber in a written Power of Attorney or Appointment of Agent by such Subscriber empowering the said Attorney-in-Fact or Agent to execute in the name of Canners Exchange Subscribers at Warner Inter-Insurance Bureau or Warner Reciprocal Insurers policies of insurance on his, their or its behalf. Said Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers, ever since they began exchanging contracts of inter-insurance, have been duly authorized by Certificates of Authority (in evidence as Exhibits 1 and 2) issued by the Director of Insurance of the State of Illinois to exchange said contracts of inter-insurance mentioned in the evidence.

Found. H. E. S., J. S. C.

6. A large proportion of the Subscribers exchanging contracts of inter-insurance under the designation of Canners Exchange Subscribers at Warner Inter-Insurance Bureau began exchanging said contracts during the year 1907 through Mr. Lansing B. Warner as attorney-in-fact, under the designation of Subscribers at Canners Exchange, but during the year 1911 the plaintiff Lansing B. Warner, Incorporated, was organized, and thereafter said Subscribers, [fol. 169] together with others who have since become Subscribers, have continued through the Attorney-in-Fact, plaintiff Lansing B. Warner, Incorporated, to exchange contracts of inter-insurance under the designation of Canners Exchange Subscribers at Warner Inter-Insurance

Bureau. A large proportion of the Subscribers exchanging contracts of inter-insurance under the designation of Warner Reciprocal Insurers began exchanging said contracts during the year 1912, through the agency of plaintiff Lansing B. Warner, Incorporated, under the designation of Wholesale Grocery Subscribers at Warner Inter-Insurance Bureau, but on January 1, 1926, said designation was discontinued, and ever since said date substantially the same subscribers, together with others who have since become Subscribers, have continued through the same Agent to exchange contracts of inter-insurance under the designation of Warner Reciprocal Insurers. Mr. Lansing B. Warner has continued throughout to act as President of Lansing B. Warner, Incorporated.

Found. H. E. S., J. S. C.

7. Said Subscribers have not associated themselves together as an association, partnership, corporation, entity, or other organization of any kind, and the designations of Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers are used solely for the purpose of identifying the persons, firms and corporations as Subscribers exchanging contracts of inter-insurance with each other as shown in the evidence.

Found. H. E. S., J. S. C.

[fol. 170] 8. The Power of Attorney (in evidence as Exhibit 6) executed at the outset by each Subscriber exchanging contracts of inter-insurance under the designation of Canners Exchange Subscribers at Warner Inter-Insurance Bureau contains, among other provisions, the following provisions:

(a) The Attorney-in-Fact is authorized to exchange contracts of inter-insurance upon the property of canners and those engaged in allied fields among the Subscribers under the designation of Canners Exchange Subscribers at Warner Inter-Insurance Bureau; to receive deposits; to give and receive notices and adjust claims, to bring and defend suits at law or in equity; and to appoint an Agent in any state for the service of process and to perform such other acts as may be necessary.

(b) The consideration for the contract of inter-insurance is the exchange of promises of indemnity, and not the payment of a premium. The obligation of the Subscriber is a

several, separate and individual liability and no policy providing for the joint liability of the Subscriber with any other Subscriber shall be executed.

(c) To secure his liability in the exchange of contracts the Subscriber agrees to deposit with the Attorney-in-Fact a sum of money to be designated "Expense and Guarantee Fund." In addition thereto the Subscriber agrees to deposit with the Attorney-in-Fact at Chicago the sum of ten dollars, to be designated "Reserve Fund" which fund may be increased to an average amount of two dollars per thousand of insurance carried by the Subscriber.

[fol. 171] (d) For its compensation the Attorney-in-Fact shall be allowed a sum equal to twenty per cent of the Expense and Guarantee Fund due from each Subscriber in return for which the Attorney-in-Fact agrees to pay all expenses in carrying out its duties, except certain enumerated expenses including the payment of losses.

(e) Each Expense and Guarantee Fund deposit shall be divided into monthly parts based upon the relation the number of days in the month bears to the total number of days covered by the policy, which amounts, less expenses, including payment of losses, shall be credited to the Subscriber as "Surplus" in amounts determined by the relation of the Reserve Fund of the Subscriber referable to insurance in force to the aggregate Reserve Funds of all Subscribers referable to all insurance in force. The proportion of losses and other expenses not otherwise provided for shall be paid, first out of said Surplus, and, if that should prove insufficient, then out of the Surplus Reserve hereinafter mentioned. The Reserve Fund of each Subscriber constitutes an additional source out of which said losses and expenses may be paid on the basis of said Subscriber's several, separate and individual liability.

(f) The liability of the Subscriber under the policy shall be only the proportionate share of the insurance granted under said policy as the Reserve Fund deposit of the Subscriber bears to the aggregate Reserve Fund deposits of all Subscribers. No policy shall be issued where the liability of the Subscriber on any one risk exceeds five times the [fol. 172] amount of the Reserve Fund except where the property is not subject to loss from one cause.

(g) A fund designated "Surplus Reserve" is to be created as a separate account of the Subscriber by crediting thereto at the end of each year twenty per cent of the Surplus of the Subscriber until the Surplus Reserve of the subscriber is five times the Reserve Fund of the Subscriber and the remainder of the Surplus is to be returned to the Subscriber.

(h) An Advisory Committee is created consisting of five members elected by the Subscribers anually, with the powers enumerated in the Power of Attorney, including the charge and keeping of all moneys and securities, less such sums as the Attorney-in-Fact is authorized to deduct. The Advisory Committee shall have full discretion in regard to investments and safe-keeping of moneys and securities, and two members of the committee shall sign checks approved by the attorney. The remaining members shall have the power to fill any vacancy that may occur in the committee.

(i) The contract of inter-insurance is issued at the office of the Attorney-in-Fact in the City of Chicago, State of Illinois; where it is made and performed.

Found. H. E. S., J. S. C.

9. That the Appointment of Agent (in evidence as Exhibit 5) executed at the outset by the Subscribers exchanging contracts of inter-insurance under the designation of Warner Reciprocal Insurers contains, among other provisions, the following provisions:

[fol. 173] (a) The exchange of contracts of inter-insurance is effected between the particular Subscriber and other Subscribers through the use of contracts of inter-insurance executed by the Agent on behalf of the said Subscriber under the designation of Warner Reciprocal Insurers, the consideration thereof being solely the exchange of contracts and not the payment of any premium.

(b) The Agent is authorized to effect the exchange of said contracts, to give and receive notices and to adjust, compromise or settle all claims for losses, to bring and defend suits at law or in equity, to appoint an agent in any state or territory for the service of process, and to perform such other acts as may be necessary.

(c) Upon the Agent's request the Subscriber agrees to deposit with the Agent at Chicago a sum denominated "Guaranty Deposit," the amount of which is to be determined by the Agent in accordance with the risk, amount and term of insurance, said fund to be held and disposed of as provided by the Appointment of Agent for the Subscriber as the separate fund of the Subscriber out of which his, their or its liability is to be paid to the extent thereof. The liability of each Subscriber is several, separate, and not joint. To determine the Subscriber's liability resulting from the exchange of insurance contracts, the "Guaranty Deposit" is divided into monthly parts, each one of which is known as the "Liability Factor" of the Subscriber for a given month, and the measure of the Subscriber's lia- [fol. 174] bility for losses and expenses for a particular month is determined on the basis of the ratio of the particular Subscriber's liability Factor to that of the aggregate Liability Factors of all Subscribers for that month. No premium is paid by any Subscriber, nor does the particular Subscriber receive any premium from any other Subscriber. No insurance contract is to be made by the Agent in which the liability of the Subscriber in relation to any one risk exceeds an amount equal to the total of the Guaranty Deposits relating to contracts in force.

(d) The Appointment of Agent provides that five "Advisors" are to be selected from the persons, firms and corporations who exchange contracts of inter-insurance under the designation of Warner Reciprocal Insurers, to exercise the authority and perform the duties prescribed thereby. In case of the disqualification, death, resignation or refusal or inability to act of any Advisor, a new Advisor is to be designated by the remaining Advisors. Meetings of the Advisors are to be held at the office of the Agent, either at regular intervals or on call.

(e) The Agent is to receive twenty per cent of each sum due from the Subscriber as a Guaranty Deposit in return for which the Agent agrees to pay all expenses incident to the carrying out of the powers conferred except certain enumerated expenses including payment of losses.

(f) After all claims and expenses for which the particular Subscriber is liable are paid out of the Guaranty

Deposit, the credit balance, if any, is transferred to the [fol. 175] Savings Account of the particular Subscriber, from which after payment of one-fifth thereof as additional compensation to the Agent, an amount not to exceed one-half of the credit balance will be set aside as a several and separate Reserve Fund to be held as additional security for the payment of liabilities of the Subscriber and the remainder returned to the Subscriber. The Reserve Fund of each individual Subscriber may not exceed an amount twice the average annual Guaranty Deposit of such Subscriber, but in practice this amount has been reduced to an amount one and one-half times said deposit. The unused portion of the Reserve Fund is returned to the Subscriber upon his ceasing to be a Subscriber.

(g) The contract of inter-insurance is to be issued at the office of the Agent in the City of Chicago, State of Illinois, where it is to be made and performed.

Found. H. E. S., J. S. C.

10. All provisions of the Power of Attorney and Appointment of Agent are carried out and fully performed by the Subscribers, Advisors, Attorney-in-Fact or Agent, and said Power of Attorney and Appointment of Agent and the contract of inter-insurance issued thereon are construed in accordance with the law of the State of Illinois; that it is essential to the successful operation of the plans upon which Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers operate, that the provisions of all Powers of Attorney and all Appointments of Agent be uniform as to each group of Subscribers.

Refused. H. E. S., J. S. C.

[fol. 176] 11. The exchange of inter-insurance by Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers is accomplished by means of contracts of inter-insurance (in evidence as Exhibits 7), signing the name "Canners Exchange Subscribers by the Attorney-in-Fact or Agent by signing the name "Canner Exchange Subscribers at Warner Inter-Insurance Bureau," or "Warner Reciprocal Insurers," respectively, and delivering the same to the Subscribers by mail sent from the office of the Attorney-in-Fact or Agent in Chicago.

The consideration for each contract of inter-insurance is not any premium or other sum paid, but solely the exchange of insurance. Said contracts of inter-insurance provide that the Subscribers are not jointly liable thereunder with other Subscribers, and that there is assumed by each Subscriber only a several, separate and individual liability for a proportionate share of the insurance granted thereunder in accordance with the provisions of the Power of Attorney and Appointment of Agent.

Found. H. E. S., J. S. C.

12. Canners Exchange Subscribers at Warner Inter-Insurance Bureau were enabled to save during the year 1938 approximately nine hundred twenty-two thousand dollars over what their insurance would have cost if they had purchased it from companies engaged in the business of insurance; Warner Reciprocal Insurers were enabled to save during the year 1938 approximately two hundred eighty-six thousand dollars over what their insurance would have cost if they had purchased it from companies engaged in [fol. 177] the business of insurance. Canners Exchange Subscribers at Warner Inter-Insurance Bureau have liquid assets on deposit in an amount of more than four million dollars, almost all of which consists of cash in banks and United States Government bonds; Warner Reciprocal Insurers have liquid assets on deposit in an amount of nearly one and a half million dollars, almost all of which likewise consists of cash in banks and United States Government bonds. Said Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers have built up the highest reputation for financial soundness, fair dealing, and the prompt payment of claims.

Found. H. E. S., J. S. C.

13. The plans upon which both groups of Subscribers exchange contracts of inter-insurance are in substantial accord with Article 10, Chapter 28, of the Consolidated Laws of New York as amended, being the prior insurance law, as construed by the Superintendent of Insurance of the State of New York, and Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers, having complied therewith, were on April 24, 1930, duly licensed (the licenses are in evidence as Exhibits 16 and 17) as inter-insurers in said state, said licenses

having been renewed from time to time. Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers ever since their compliance with the aforesaid laws have been, and now are, licensed as inter-insurers in the State of New York.

Found. H. E. S., J. S. C.

[fol. 178] 14. Prior to June 15, 1939, the State of New York enacted, to become law on said date, an Act in relation to insurance corporations wherein and whereby Chapter 28 of the Consolidated Laws of New York as amended was repealed as of January 1, 1940, and all matters appertaining to insurance within said state since January 1, 1940, have been governed by said Insurance Law of 1939. Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers are desirous of qualifying under the valid provisions of said Insurance Law of 1939 and of securing licenses thereunder.

Found. H. E. S., J. S. C.

15. Canners Exchange Subscribers at Warner Inter-Insurance Bureau are persons, firms and corporations engaged in the canning business and allied lines, while Warner Reciprocal Insurers are persons, firms and corporations engaged in the wholesale grocery business and allied lines.

Found. H. E. S., J. S. C.

16. The Attorney-in-Fact or Agent selects the individuals, firms or corporations to become Subscribers. Annually each Subscriber makes a deposit with the Attorney-in-Fact or Agent of a sum which roughly corresponds with the premium which would be charged by an "old line" Company upon a similar risk. Title to such deposit remains in each Subscriber. The liability of each Subscriber is several and, generally speaking, is determined by the ratio which the particular Subscriber's deposit bears to the total deposit of all Subscribers. The Attorney-in-Fact or Agent retains twenty per cent of the deposit as its compensation, [fol. 179] out of which operating expenses must be paid. Under the plan employed by Warner Reciprocal Insurers one-fifth of the unused portion of the deposit is paid to the Agent as additional compensation. There is no provision for additional compensation to the Attorney-in-Fact in the

Camers Exchange Subscribers at Warner Inter-Insurance Bureau group. The portion of the deposit remaining unused after the payment of losses and expenses is known as a Saving. Until reserves in a certain amount are built up for each Subscriber, a fraction of the saving each year is used for this purpose, the remainder being returned to the Subscriber. When the reserve fund is built up to a certain point, the entire saving is thereafter annually returned to the Subscriber. The Subscriber retains title to all reserve funds as well as to the deposit. It has never been necessary to fall back upon any of the Reserve Funds in the payment of losses and expenses of either group.

Found. H. E. S., J. S. C.

17. The Power of Attorney and Appointment of Agent both provide for the appointment of Advisors who meet periodically. Their functions are largely limited to the deposit and investment of assets and the countersigning of checks. The Advisors do not supervise nor exercise ultimate authority over the Attorney-in-Fact or Agent, as the Attorney-in-Fact or Agent is the ultimate power in both groups.

Found. H. E. S., J. S. C.

18. Lansing B. Warner, Incorporated, as Attorney-in-Fact and Agent, has been extremely zealous to localize the activities of both groups in the City of Chicago, Illinois.

Found. H. E. S., J. S. C.

[fol. 180] 19. Application blanks (in evidence as Exhibits 3 and 4) are blank forms for the Power of Attorney or Appointment of Agent (in evidence as Exhibits 5 and 6) are mailed to the prospective Subscribers from the Chicago office. These are returned to Chicago by mail. The applications are received in Chicago and are accepted there. *There is no solicitation of new Subscribers.* New Subscribers are sometimes suggested and recommended by Subscribers resident in New York to friends and associates. No one in the field has authority to accept new Subscribers or otherwise bind the Attorney-in-Fact or Agent. New Subscribers are accepted only by the Attorney-in-Fact or Agent at its office in Chicago. Upon receipt of the application the Chicago office sends out a trained insurance engineer to inspect the property and report his findings. The

engineer may also advise the prospective Subscribers as to the method whereby the hazard may be decreased. In determining whether an applicant is qualified to become a Subscriber, the Attorney-in-Fact or Agent may obtain information from banks, credit agencies and the like, as well as from Subscribers resident in various parts of the country, who know the applicant. Information relative to a New York applicant may be obtained in the State of New York as well as elsewhere. In both groups, but particularly in the Canners group, the Subscribers scattered throughout the country usually know those engaged in their own lines of business, from whom the applications are received, and are in a position to make recommendations concerning the applicant's desirability as a Subscriber. The Powers [fol. 181] of Attorney and Appointments of Agent in respect to New York property are executed elsewhere as well as in New York State. This is particularly true in the Canners group, where many of the Powers of Attorney have been executed in Chicago at the annual Canners convention in that city. Upon deciding to accept the applicant, the Attorney-in-Fact or Agent executes a contract of interinsurance which it mails to the new Subscriber from Chicago. The deposit is then sent in by the new Subscribers to Chicago by mail.

Found, except sentence in italics. H. E. S., J. S. C.

20. Once the Power of Attorney or Appointment of Agent has been executed and accepted, it continues in force until revoked. The Subscribers in both groups have been fairly constant.

Found. H. E. S., J. S. C.

21. The overwhelming number of losses are small losses which are adjusted as a matter of course by the Attorney-in-Fact or Agent without sending anyone into the field to inspect the premises. In the event of an unusual loss, however, an inspector is sent from Chicago to view the property to determine the extent of the damage and to ascertain the cause of the fire in order that future losses from the same cause may be prevented. No person has any authority to enter into an adjustment of any loss in the field. All losses are adjusted by the Attorney-in-Fact or Agent at its office in Chicago, and, when adjusted, are paid

by check issued at Chicago and sent by mail to the Subscriber.

Found. H. E. S., J. S. C.

[fol. 182] "There is no performance under the contracts of inter-insurance in New York State or in any other state, except Illinois. All performance under said contracts takes place at the office of Lansing B. Warner, Incorporated, in Chicago.

Refused. H. E. S., J. S. C.

23. Lansing B. Warner, Incorporated, transacts all of its business in the City of Chicago.

Refused. H. E. S., J. S. C.

24. In practice neither the Attorney-in-Fact nor Agent ever departs from the terms and conditions of the Power of Attorney and Appointment of Agent.

Found. H. E. S., J. S. C.

25. The record of Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers has been high both in their financial standings and in their payment of losses. Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers have saved from thirty to fifty per cent in the cost of their fire insurance by reason of their use of this method of reciprocal insurance. The reasons for such savings are mainly two: 1) the elimination of the agency system, with its costly commissions; 2) careful selection of Subscribers resulting in a lower los- ratio than among ordinary companies.

Found. H. E. S., J. S. C.

26. The reasons that licenses have been obtained from the Insurance Department of the State of New York are: 1) the advantages accruing to the New York Subscribers in the appointment of the Superintendent of Insurance of [fol. 183] New York as agent for the service of process in New York; and 2) the advantages accruing to the New York Subscribers in permitting both groups to file annual financial statements as a matter of public record for inspection by New York Subscribers. Since 1936, when the taxing statute was passed, both groups of Subscribers have

paid taxes to the State of New York in the amount of two per cent of the net deposits received from New York Subscribers.

Found. H. E. S., J. S. C.

27. The prior insurance law of the State of New York contained a provision relative to the countersignature of contracts of insurance in the State of New York by a resident agent substantially similar to that of the Insurance Law of 1939. The Superintendent of Insurance of said state has never made any attempt to enforce the said provision against plaintiffs.

Found. H. E. S., J. S. C.

28. The insured properties are distributed generally throughout the State of New York and elsewhere, with never more than one to two in any given place. There is no conflagration hazard. Because the properties are so widely distributed throughout the State of New York, it would be impracticable for a resident agent located in any one place to inspect the properties or otherwise perform services, even if he were otherwise qualified in regard to these highly specialized risks. The resident agent would serve no useful purpose.

Refused. H. E. S., J. S. C.

29. If plaintiffs were compelled to countersign in the State of New York their contracts of inter-insurance on [fol. 184] New York property, the contracts so countersigned would become subject to New York law and construed in accordance therewith. Therefore rights of Subscribers having risks in New York State, under the contracts so countersigned, would be different from rights of Subscribers having risks in other states, concerning which, the liability would be determined, as in the past, by Illinois law. Thus a conflict would be created in the rights of all of the Subscribers, and the system of reciprocal insurance now used would be thrown out of balance and ultimately destroyed.

Refused. H. E. S., J. S. C.

30. It is absolutely necessary that the rights and obligations of the Subscribers everywhere be the same.

Refused. H. E. S., J. S. C.

31. Compelling the countersignature of said contracts of inter-insurance in New York would add materially to the cost of the insurance by imposing the agency system used by stock insurance companies upon the plaintiffs. Such agency system, if its use were compelled, would increase the cost of plaintiffs' insurance twenty-five per cent.

Refused. H. E. S., J. S. C.

32. Compelling plaintiffs to cause all contracts of inter-insurance upon property located in the State of New York to conform in all particulars to the standard fire insurance policy of said state, would require plaintiffs to include within their contracts many terms not applicable, and would produce inequities among the Subscribers which would ultimately lead to a breaking down of plaintiffs' plan of inter-insurance.

Refused. H. E. S., J. S. C.

[fol. 185] 33. Compelling plaintiffs to provide for an "Advisory Committee" chosen by the Subscribers, which, subject to the articles of association and power of attorney, would have ultimate power and responsibility in the management and control of plaintiffs' affairs, would result in a decentralization of authority that would take away the responsibility in the management of plaintiffs' affairs from the Attorney-in-Fact or Agent, experience in underwriting and engineering, and place the responsibility in an Advisory Committee. This would ultimately destroy plaintiffs' plan of inter-insurance.

Refused. H. E. S., J. S. C.

34. The refusal to permit plaintiffs to make any new agreement for inter-insurance with any person, firm or corporation not having net assets in excess of ten thousand dollars, or any renewal agreement with Subscribers not having such net worth, unless such Subscribers have accumulated reserves in a certain amount, in view of the uncontroverted proof that there is no necessity for such provision, would constitute an arbitrary and discriminatory regulation which would deny to the small business man the right to carry this insurance, as well as deny the right to a great number of Subscribers to continue their present insurance.

Found. H. E. S., J. S. C.

35. The compelling of plaintiffs to accumulate and maintain a special contingent surplus or guaranty surplus at the rate of one per cent of the Subscriber's so-called net premium income for each year until an amount is accumulated at least equal to the amount of minimum surplus re-
[fol. 186] quired to be built up, that is, two hundred fifty thousand dollars, without providing for the separate ownership thereof, and providing that the contingent surplus shall not be impaired or paid out by dividend, distribution, or returns of continuing or retiring Subscribers' reserves or deposits, except in the event of liquidation, would clearly increase the cost to each Subscriber, inasmuch as such a requirement would take the Subscriber's money out of his separate account and transfer it to a general joint fund. This would strike at the very heart of reciprocal insurance by requiring a joint fund and imposing joint liability upon Subscribers, because in reciprocal insurance the liability is never joint, but is always several. The evil of joint liability is that one Subscriber might be held for another's liability and perhaps wiped out of business as a result. To impose this requirement would ultimately break down plaintiffs' system of inter-insurance.

Refused. H. E. S., J. S. C.

36. The enforcement of a requirement that plaintiffs execute and acknowledge their Powers of Attorney and Subscriber's Agreements in a manner sufficient for the acknowledgment of the conveyance of real property to be recorded in the state in which the Subscriber is domiciled, would unnecessarily hamper the operation of the plan of insurance, render it less efficient and increase the expense. Lansing B. Warner, Incorporated has never known of an instance where a signature to a Power of Attorney or appointment of Agent has been placed thereon through mistake or error, or as the result of forgery.

Refused. H. E. S., J. S. C.

[fol. 187] 37. The enforcement of a requirement against plaintiffs that the Power of Attorney or Appointment of Agent shall provide for an annual meeting of Subscribers at which each Subscriber shall have power to vote in person or by proxy for all members of the Advisory Committee to be chosen or appointed at such time, and which purports

to provide that the Power of Attorney shall include a provision empowering the Advisory Committee to make regulations for the control and custody of funds and investments, would represent an attempt to make a mutual insurance company out of plaintiffs' inter-insurance and to provide for a Board of Directors and a membership in some sort of company or association, which does not exist. Such a regulation would also tend to hybridize plaintiffs' plan of insurance, decentralize the authority, and generally destroy its efficiency.

Refused. H. E. S., J. S. C.

38. The enforcement of a requirement against plaintiffs that every contract of inter-insurance and every Power of Attorney under which such contracts are issued or exchanged shall provide for a contingent several liability for assessment of a Subscriber as an inter-insurer on the risks of every other Subscriber in an amount of not less than one nor more than ten times the amount paid for, and in addition to the so-called annual premium expressed in such contract, would represent an attempt to change the liability provided in plaintiffs' contracts and destroy the balance of plaintiffs' plan of exchanging contracts.

Refused. H. E. S., J. S. C.

[fol. 188] 39. The enforcement of a requirement against plaintiffs that every Subscriber shall be required to accumulate a minimum operating reserve by authorizing the Attorney-in-Fact or Agent to credit to the Subscriber an amount not less than one-quarter of such Subscriber's earnings as an underwriter until such reserve is equal to the larger of the following amounts: Twice the amount of the so-called annual premium or premiums or the Subscriber's pro rata share determined on the basis of the so-called annual premiums in force, or an aggregate operating reserve of one-half of one per cent of the aggregate amount of insurance in force, would result in building up reserves far in excess of those proven to be sufficient, and compel the Subscribers to keep more money than necessary on deposit. The annual deposit at present required by plaintiffs has been sufficient for the payment of losses and expenses, and to provide for emergencies for the past thirty-two years of operation and still return large savings to the Subscribers. No other state requires the building up of

such high reserves as to either reciprocal insurers or stock insurance companies. Such a requirement would be an arbitrary discrimination against reciprocal insurers. Ordinary companies are not compelled to accumulate a reserve of double the amount of their annual premium. It is pointed out in the record (page 87) that such requirement would put many stock companies out of business. Plaintiffs have no earnings as an underwriter; the provision is entirely foreign to reciprocal insurance and incapable of application to plaintiffs.

Found. H. E. S., J. S. C.

[fol. 189] 40. The enforcement against plaintiffs of a regulation compelling them to provide that no Subscriber shall have a secured or preferred claim against his operating reserves, which shall be available for payment of claims of policyholders and creditors in preference to any claim for withdrawal, would impose a clear joint liability upon the Subscribers, which joint liability is absolutely contrary to the entire idea and plan of plaintiffs' reciprocal insurance, and would ultimately lead to the destruction thereof.

Refused. H. E. S., J. S. C.

41. To require plaintiffs to provide that all of their assets shall be liable primarily for the payment of all liabilities incurred under their contracts of inter-insurance and that no part of plaintiffs' surplus funds shall be subject to the claims of general creditors of any individual Subscriber until all contracts of inter-insurance under which any such Subscriber is obligated have been terminated, and in no event beyond the amount of such Subscriber's operating reserve, would impose a joint liability of the Subscribers which would tend toward the destruction of plaintiffs' plan of inter-insurance.

Refused. H. E. S., J. S. C.

42. It would be impossible for plaintiffs to comply with a provision which purported to require that every Subscriber's account be credited with premiums earned by him as an underwriter on the contracts of inter-insurance exchanged by plaintiffs and charged with the proportionate share of all losses incurred under said contracts, as well [fol. 190] as with the expenses incurred by the insurers. There is no premium, nor premium earned by the Sub-

scriber, in plaintiffs' inter-insurance, and such a provision would be incapable of application. The attempt to apply any such regulation would be destructive of plaintiffs' system of inter-insurance.

Found. H. E. S., J. S. C.

43. To impose upon plaintiffs a requirement that they maintain at least one office in the State of New York and a principal place of business in said state, would in effect compel plaintiffs to hamper their activities and increase their expense by the use of the stock insurance company agency system.

Refused. H. E. S., J. S. C.

Conclusions of Law

1. That the State of New York has no jurisdiction over the contracts of inter-insurance exchanged by the plaintiffs.

Refused. H. E. S., J. S. C.

2. That the statutes alleged in both complaints, and each and every one of them, are harsh, unreasonable, arbitrary and discriminatory, without any reasonable relation to any proper legislative purpose.

Refused. H. E. S., J. S. C.

3. That Section 130 of the Insurance Law of 1939 by its terms applies only to contracts issue, delivered or otherwise effectuated in the State of New York and therefore has no application to the contracts of inter-insurance mentioned in the evidence, and that the application of said statute to future transactions shall be left open to be deter-
[fol. 191] mined as such issue may in the future arise.

Found. H. E. S., J. S. C.

4. That the plaintiffs are entitled to a judgment declaring that that part of Section 168, Subsection 2, of the Insurance Law of 1939, which purports to provide as to foreign reciprocal insurers licensed in New York that no policy or contract of fire insurance, shall be made, issued or delivered by such insurers on any property in the State of New York, unless it shall conform in all particulars to the "standard fire insurance policy of the State of New York," referred to in Subsection 1 of the said Section 168, is invalid as against the plaintiffs and repugnant to the Constitutions of the State of New York and of the United States, and re-

straining the defendants, their employees, agents and attorneys from enforcing or attempting to enforce the same against them.

Refused in form, Sec. 168 is partly valid. H. E. S., J. S. C.

5. That the plaintiffs are entitled to a judgment declaring that that part of Section 410, Subsection 1, of the Insurance Law of 1939, which as to foreign reciprocal insurers licensed in New York, purports to require that the term "Advisory Committee" shall include any official body, by whatever name called, chosen by the Subscribers, and which has, subject to the articles of association and power of attorney, ultimate power and responsibility in the management and control of the affairs of the reciprocal insurers, is invalid as against the plaintiffs and repugnant to the Constitutions of the State of New York and of the United [fol. 192] States, and restraining the defendants, their employees, agents and attorneys for enforcing or attempting to enforce the same against them.

Refused. H. E. S., J. S. C.

6. That the plaintiffs are entitled to a judgment declaring that that part of Section 412, Subsection 1, of the Insurance Law of 1939, which purports to require that no foreign reciprocal insurers licensed in New York shall make any new agreement for insurance with any person, firm or corporation not having assets in an amount not less than ten thousand dollars in excess of liabilities, as shown by a report of a commercial agency having 100,000 subscribers, or by a sworn statement, and that before renewing a contract of insurance with a Subscriber, similar proof of financial responsibility shall be required unless the Subscriber has accumulated and maintains a so-called Subscriber's operating reserve purported to be required by Section 418 of the Insurance law of 1939, is invalid as against the plaintiffs and repugnant to the Constitutions of the State of New York and of the United States, and restraining the defendants, their employees, agents and attorneys from enforcing or attempting to enforce the same against them.

Found. H. E. S., J. S. C.

7. That the plaintiffs are entitled to a judgment declaring that that part of Section 413, Subsection 2, of the Insur-

ance Law of 1939, which purports to require all foreign reciprocal insurers licensed in New York, in relation to contracts of inter-insurance entered into both within and [fol. 193] without the State of New York, to accumulate and maintain a special contingent surplus or guaranty surplus at the rate of one per cent of the insurers' net premium income for each year, until an amount is accumulated at least equal to the amount of minimum surplus required to be built up, to-wit, two hundred fifty thousand dollars, without providing for the separate ownership thereof, thereby taking the separate property of the Subscriber and placing it in a common fund for the satisfaction of liabilities of other Subscribers, and which purports to require that the contingent surplus shall not be impaired or paid out by dividend, distributions or by returns of continuing or retiring Subscribers' reserves or deposits, except in the event of liquidation, and therefore imposes a joint liability upon each Subscriber with all other Subscribers for all losses and expenses to the extent of said purported contingent fund as aforesaid, is invalid as against the plaintiffs and repugnant to the Constitutions of the State of New York and of the United States, and restraining the defendants, their employees, agents and attorneys from enforcing or attempting to enforce the same against them.

Refused. H. E. S., J. S. C.

8. That the plaintiffs are entitled to a judgment declaring that that part of Section 415, Subsection 1, of the Insurance Law of 1939, which purports to require that every Subscriber of all foreign reciprocal insurers licensed in New York shall execute and acknowledge a power of attorney in a manner sufficient for the acknowledgment of conveyances of real property to be recorded in the state in which the [fol. 194] Subscriber is domiciled, is invalid as against the plaintiffs and repugnant to the Constitutions of the State of New York and of the United States, and restraining the defendants, their employees, agents and attorneys from enforcing or attempting to enforce the same against them.

Refused. H. E. S., J. S. C.

9. That the plaintiffs are entitled to a judgment declaring that that part of Section 415, Subsection 1 (d), of the Insurance Law of 1939, which purports to require in reference to foreign reciprocal insurers licensed in New York

that the power of attorney shall provide for an annual meeting of the Subscribers at which each Subscriber shall have power to vote in person or by proxy for all members of the Advisory Committee to be chosen or appointed at such time, is invalid as against the plaintiffs and repugnant to the Constitutions of the State of New York and of the United States, and restraining the defendants, their employees, agents and attorneys from enforcing or attempting to enforce the same against them.

Refused. H. E. S., J. S. C.

10. That the plaintiffs are entitled to a judgment declaring that that part of Section 417, Subsection 1, of the Insurance Law of 1939, which purports to require as to foreign reciprocal insurers licensed in New York, that every contract of insurance and every power of attorney under which contracts of insurance are issued or exchanged shall provide for a contingent several liability for assessment of the Subscriber as an inter-insurer on the risks of every other Subscriber in an amount of not less than one nor more than [fol. 195] ten times the amount of and in addition to the annual premium expressed in such contract, is invalid as against the plaintiffs and repugnant to the Constitutions of the State of New York and of the United States, and restraining the defendants, their employees, agents and attorneys from enforcing or attempting to enforce the same against them.

Refused. H. E. S., J. S. C.

11. That the plaintiffs are entitled to a judgment declaring that that part of Section 418, Subsection 1, of the Insurance Law of 1939, which, as to foreign reciprocal insurers licensed in New York, purports to require that every Subscriber shall be required to accumulate a minimum operating reserve by authorizing the attorney-in-fact to credit to the Subscriber an amount not less than one-quarter of such Subscriber's earnings as an underwriter until such reserve is equal to the larger of the following amounts: (a) Twice the amount of the so-called annual premium or premiums; or (b) the Subscriber's pro rata share, determined on the basis of the so-called annual premiums in force, of an aggregate operating reserve of one-half of one per cent of the aggregate amount of insurance in force, is invalid as against the plaintiffs and repugnant to the Constitutions of

the State of New York and of the United States, and restraining the defendants, their employees, agents and attorneys from enforcing or attempting to enforce the same against them.

Found. H. E. S., J. S. C.

12. That the plaintiffs are entitled to a judgment declaring that that part of Section 418, Subsection 3, of the Insur- [fol. 196] ance Law of 1939, which, as to foreign reciprocal insurers licensed in New York, purports to require that no Subscriber shall have a secured or preferred claim against the operating reserve which shall be available for payment of claims of policy-holders and creditors in preference to any claim for withdrawal, and thus purports to make the liability of each Subscriber joint with that of all other Subscribers to the extent of the operating reserve, is invalid as against the plaintiffs and repugnant to the Constitution of the State of New York and of the United States, and restraining the defendants, their employees, agents and attorneys from enforcing or attempting to enforce the same against them.

Found. H. E. S., J. S. C.

13. That the plaintiffs are entitled to a judgment declaring that that part of Section 420 of the Insurance Law of 1939 which purports to require that all assets of foreign reciprocal insurers licensed in New York, including Subscribers' operating reserves, shall be liable primarily for payment of all liabilities incurred under their policies or other contracts, and that no part of the surplus funds of the said reciprocal insurers shall be subject to the claims of general creditors of any individual Subscriber until all policies under which any such Subscriber is obligated have been terminated, and in no event beyond the amount of such Subscriber's operating reserve, thereby purporting to impose joint liability upon each Subscriber with all other Subscribers to the extent of said assets, and which also purports to require that surplus to policy holders be reported in the financial report to the state, (1) Special [fol. 197] contingent surplus, (2) Subscribers' operating reserves; (3) All other surplus, if any, and declaring that those portions of the Insurance Law of 1939 which provide for the creation, building up and maintenance of the so-called special contingent surplus and Subscribers' operat-

ing reserves, are invalid as against the plaintiffs and repugnant to the Constitutions of the State of New York and of the United States, and restraining the defendants, their employees, agents, and attorneys from enforcing or attempting to enforce the same against them.

Refused. H. E. S., J. S. C.

14. That the plaintiffs are entitled to a judgment declaring that that part of Section 421 of the Insurance Law of 1939 which as to foreign reciprocal insurers licensed in New York purports to require that each Subscriber's account be credited with premiums earned by him as an underwriter on the policies issued by the exchange, and charged with his proper share of all losses incurred under such policies as well as with the expenses incurred by the insurer, is invalid as against the plaintiffs and repugnant to the Constitutions of the State of New York and of the United States, and restraining the defendants, their employees, agents and attorneys from enforcing or attempting to enforce the same against them.

Found. H. E. S., J. S. C.

15. That the plaintiffs are entitled to a judgment declaring that that part of Section 422, Subsection 1, of the Insurance Law of 1939, which purports to require all foreign reciprocal insurers licensed in the State of New York to maintain at least one office in said state, and of Section 40, [fol. 198] Subsection 4, of the Insurance Law of 1939, which purports to require that every license issued by the State of New York to foreign reciprocal insurers shall state the place of business in the said state, to be invalid as against the plaintiffs and repugnant to the Constitutions of the State of New York and of the United States, and that the defendants, their employees, agents and attorneys be restrained from enforcing or attempting to enforce the same.

Refused. H. E. S., J. S. C.

I hereby direct that judgment be entered in accordance with the foregoing.

Dated, March 31st, 1941.

Harry E. Schirick, Justice of the Supreme Court.

[fol. 199] In Supreme Court of New York, Albany County

[Title omitted]

Requests to Find by Defendants

[fol. 200] The defendants herein respectfully request the the Court to make the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. At all times herein material, the plaintiff, Hoopeston Canning Company, was a corporation duly organized under the laws of the State of Illinois; the plaintiff, E. Pritchard, Inc., was a corporation duly organized under the laws of New Jersey; the plaintiff, Lansing B. Warner, was a corporation duly organized under the laws of the State of Illinois; the plaintiff, Harry M. Brown, is a resident of the State of New York; the plaintiff, James T. Smith, was a resident of the State of Pennsylvania; the plaintiff, Paul E. Emerson, was a resident of the State of New York; and the plaintiff Ben A. Morton, was a resident of the State of Tennessee.

Found. H. E. S., J. S. C.

2. The defendant, Louis H. Pink, is the Superintendent of Insurance of the State of New York; the defendant, John J. Bennett, Jr., is the Attorney-General of the State of New York.

Found. H. E. S., J. S. C.

3. Canners Exchange Subscribers at Warner Inter-Insurance Bureau is composed of nine hundred eighty-six subscribers.

Found. H. E. S., J. S. C.

4. The number of subscribers in the State of New York to Canners Exchange Subscribers at Warner Inter-Insurance Bureau, is approximately ninety-three.

Found. H. E. S., J. S. C.

[fol. 201] 5. Warner Reciprocal Insurers is composed of approximately twenty-one hundred subscribers.

Found. H. E. S., J. S. C.

6. The number of subscribers in the State of New York to Warner Reciprocal Insurers is approximately two hundred thirty.

Found. H. E. S., J. S. C.

7. Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers have been licensed by the Insurance Department of the State of New York to do business in this State since the year 1930.

Found. H. E. S., J. S. C.

8. Neither Canners Exchange Subscribers nor Warner Reciprocal Insurers have an office or agent in the State of New York.

Found. H. E. S., J. S. C.

9. Approximately fifty thousand contracts of inter-insurance affecting New York State risks have been executed since the two exchanges, Canners Exchange Subscribers and Warner Reciprocal Insurance began.

Found. H. E. S., J. S. C.

10. Risks written on property situated in the State of New York and premiums or deposits received therefrom for the period from 1931 to 1938, inclusive, as contained in the Annual Statement filed for said years by Canners Exchange Subscribers and Warner Reciprocal Insurers, with the Superintendent of Insurance of the State of New York, are as follows:

[fol. 202]

Canners Exchange Subscribers

Year	Gross Risks Written	Risks Cancelled	Net Risks Written	Gross Premiums on Risks Written	Return Premiums	Net Premiums Received	Losses Paid
1931	$23,063,126	$15,194,247	$7,868,879	$208,980.94	$193,194.08	$105,786.86	$291,556.90
1932	17,293,976	7,749,840	9,544,136	219,054.29	159,759.77	59,294.52	74,190.08
1933	17,823,402	7,797,239	10,026,163	221,931.65	145,619.47	76,312.18	12,698.47
1934	28,801,435	11,482,851	17,318,584	343,915.50	220,547.99	122,367.51	51,407.40
1935	.....	.....	.....	364,475.06	106,995.57	257,479.49	736.77
1936	43,476,752	19,249,136	24,227,616	412,510.67	130,199.21	282,311.46	131,185.38
1937	66,623,128	27,801,701	38,821,427	497,720.78	189,945.38	307,775.40	23,650.52
1938	81,610,814	49,798,394	31,812,420	.....	140,102.75	298,284.87	42,985.54

Warner Reciprocal Insurers

1931	7,465,482	2,855,777	4,609,705	71,009.56	42,479.68	28,529.88	332.10
1932	7,372,413	2,088,278	5,284,135	68,015.28	42,510.04	25,505.24	1,125.81
1933	8,487,458	2,251,781	6,235,673	74,109.38	33,157.25	40,952.13	34,344.54
1934	9,810,008	1,839,789	7,970,219	82,694.64	36,961.26	45,733.38	8,035.40
1935	.....	.....	.....	91,822.13	18,127.86	73,694.27	728.93
1936	14,460,222	4,036,937	10,423,285	112,413.48	25,156.44	87,257.04	18,054.64
1937	18,499,063	5,940,617	12,558,446	123,801.94	29,049.99	94,751.95	22,540.72
1938	38,738,184	17,289,445	21,448,739	.....	39,186.48	95,162.82	26,220.82

Found. H. E. S., J. S. C.

11. The number of subscribers in New York State to both groups has remained fairly constant during the period covered by the annual report for the years 1931 to 1938, and also during the years 1939 and 1940, and so remains at the present time. The activities of both groups with respect of contracts affecting risks situated in the State of New York have continued to be and now are substantially the same as they were when the two groups first obtained a license to do business in this state in 1930.

Found. H. E. S., J. S. C.

12. Since 1936, both groups have been paying a tax upon the net income received from the subscribers in the State of New York.

Found. H. E. S., J. S. C.

13. In the action in which Paul E. Emerson and Ben. A. Morton are individual plaintiffs, the Appointment of Agent [fol. 203] and Policies, attached to and made a part of the complaint and marked Exhibits "A," "B," and "C" respectively, contain the full contract between the agent in fact and the subscribers, except for the additional condition which is attached to and made a part of the aforesaid exhibits, filed with the Superintendent of Insurance of the State of New York, and reading as follows:

"Any action or other proceedings to enforce the provisions of this policy may be brought against the Attorney-in-Fact for Warner Reciprocal Insurers as representing all of said subscribers, and each Subscriber agrees to abide by the result of any suit or proceedings so brought as fixing the proportionate amount of his or their individual liability thereunder."

Found. H. E. S., J. S. C.

14. In the action in which Harry M. Brown and James T. Smith are individual plaintiffs, the Power of Attorney and Policies, attached to and made a part of the complaint, and marked Exhibits "A," "B," and "C" respectively, contain the full contract between the Attorney and the Subscribers, except for the additional condition which is attached to and made a part of the aforesaid exhibits filed with the Superintendent of Insurance of the State of New York, and reading as follows:

"Any action or other proceedings to enforce the provisions of this policy may be brought against the Attorney-

in-Fact for Canners Exchange Subscribers at Warner Inter-Insurance Bureau as representing all of said Subscribers, and each Subscriber agrees to abide by the result of [fol. 204] any suit or proceedings so brought as fixing the proportionate amount of his or their individual liability hereunder."

Found. H. E. S., J. S. C.

15. The documents exchanged by the plaintiffs, both in Canners Exchange Subscribers and Warner Reciprocal Insurers, are contracts of insurance.

Found. H. E. S., J. S. C.

16. All the subscribers in both groups are associated in the common aim or purpose of receiving and giving indemnity in case of loss. The liability of each Subscriber is to pay his part of the losses and expenses in the ratio that his deposit bears to all the deposits.

Found. H. E. S., J. S. C.

17. Each subscriber is dependent upon all the other subscribers to keep down his losses so that his insurance cost will be low.

Found. H. E. S., J. S. C.

18. A portion of the deposit made by the subscriber is used to pay a share of the losses, the fee of the agent, taxes, and similar expenses. The subscriber does not retain title in the share or portion of the deposit so paid in. The portion of the deposit so paid in is the consideration or premium paid for the indemnity contracted for.

Refused, except first sentence. H. E. S., J. S. C.

19. The deposit of each individual subscriber is not held as a separate fund. All the deposits are commingled and deposited in the name of the Agent or Attorney in Fact in one or several Banks.

Found. H. E. S., J. S. C.

[fol. 205] 20. The functions of the Advisory Committee are largely limited to the deposit and investment of assets and the countersigning of checks. They do not supervise the Attorney or Agent in Fact, nor do they exercise authority over him. The Agent is the ultimate power in both groups. He passes upon and accepts new subscribers without the consent of the Advisory Committee.

Found. H. E. S., J. S. C.

21. The insurance engineers explain the plan to prospective subscribers, explain the qualifications that are required, and in general explain the plan of inter-insurance.

Found. H. E. S., J. S. C.

22. Prospective subscribers are at times interviewed by the insurance engineers before any request for information or application blanks is made by the prospective subscriber to the Attorney or Agent in Fact.

Found. H. E. S., J. S. C.

23. The insurance engineers investigate the risk and moral hazard, and gather all other available information with respect to the prospective subscriber, in the State of New York.

Found. H. E. S., J. S. C.

24. The insurance engineers are consulted as to the eligibility of prospective subscribers. They recommend the acceptance of prospective subscribers to the Attorney or Agent in Fact.

Found. H. E. S., J. S. C.

25. The insurance engineers carry blank application blanks, which are furnished to prospective subscribers on request.

Found. H. E. S., J. S. C.

[fol. 206] 26. The insurance engineers carry blank forms of appointment of agent and power of attorney. These are furnished to prospective subscribers by the insurance engineers upon request. The power of attorney or appointment of agent is fully executed, in the State of New York. It is complete when the prospective subscriber affixes his signature in this state, oftentimes in the presence of the insurance engineer.

Found. H. E. S., J. S. C.

27. The premiums or deposits are paid with checks drawn on New York State banks. The losses are paid by checks on Chicago banks.

Found. H. E. S., J. S. C.

28. In case of loss, particularly a large one, the insurance engineers investigate the cause of the loss and the extent thereof. The investigation with respect of the loss is made in the State of New York.

Found. H. E. S., J. S. C.

29. Employees who solicit applicants and advise them and the insurer are known as and hold themselves out as "insurance engineers."

Refused. H. E. S., J. S. C.

Conclusions of Law

1. The instruments exchanged by the plaintiffs are contracts of insurance.

Found. H. E. S., J. S. C.

2. Plaintiffs are a voluntary association of persons, firms and corporations, associated in a co-operative system of insurance.

Found. H. E. S., J. S. C.

[fol. 207] 3. The plaintiffs are doing the business of insurance in the State of New York.

Found. H. E. S., J. S. C.

4. The doing of the insurance business in the State of New York by the plaintiffs is subject to the statutes alleged in both complaints.

Found. H. E. S., J. S. C.

5. The statutes alleged in both complaints are valid with respect to the business of insurance done by the plaintiffs in the State of New York.

Refused in form. H. E. S., J. S. C.

6. The statutes alleged in both complaints are valid with respect to any act which effects, aids or promotes the doing of an insurance business by the plaintiffs in the State of New York.

Refused in form. H. E. S., J. S. C.

7. Section 130 of the Insurance Law requiring the countersigning of policies by a resident agent is valid, and applies to contracts exchanged by the plaintiffs while doing the business of insurance in the State of New York.

Refused in form. H. E. S., J. S. C.

8. Section 422, Subsection 1, of the Insurance Law, requiring every authorized reciprocal insurer to maintain at least one office in the State of New York, is valid and applies to the business of insurance done by the plaintiffs in this state in connection with the contracts mentioned in the evidence.

Found. H. E. S., J. S. C.

9. Section 40, Subsection 4, of the Insurance Law, requiring a license issued to an insurer to do business in this State, is valid and applies to a license to do insurance busi-
[fol. 208] ness in the State of New York in connection with the contracts mentioned in the evidence.

Found. H. E. S., J. S. C.

10. Section 168, Subsection 2, of the Insurance Law, providing for the use of the standard fire insurance policy, is valid and applies to contracts made in connection with insurance business done by the plaintiffs in the State of New York.

Found to be valid in part and invalid in part. Refused in form. H. E. S., J. S. C.

11. Section 410, Subsection 1, of the Insurance Law, providing that, except subject to the articles of association and subscriber's agreement, the Advisory Committee has the ultimate power and responsibility in the management and control of the affairs of a reciprocal insurer, is valid and applies to the plaintiffs while doing business in the State of New York.

Found. H. E. S., J. S. C.

12. Section 412, Subsection 1, of the Insurance Law, limiting new subscribers to those having assets of at least $10,000, in excess of liabilities, is valid and applies to the contracts mentioned in the evidence.

Refused. H. E. S., J. S. C.

13. Section 413, Subsection 2, of the Insurance Law, providing for a contingent or guaranty surplus of at least $250,000, is valid and applies to the plaintiffs while doing an insurance business in the State of New York.

Found. H. E. S., J. S. C.

[fol. 209] 14. Section 415, Subsection 1, of the Insurance Law, requiring the acknowledgement of the subscriber's agreement to be made in a manner sufficient for the acknowledgement of conveyances of real property, is valid, and applies to the contracts mentioned in the evidence when used in connection with business done by the plaintiffs in the State of New York.

Found. H. E. S., J. S. C.

15. Section 415, Subsection 1 (d), of the Insurance Law, providing for an annual meeting of the subscribers, is valid

and applies to the plaintiffs while doing business in this state.

Found. H. E. S., J. S. C.

16. Section 417, Subdivision 1, of the Insurance Law, requiring contracts exchanged by a reciprocal insurer to do business in this State, to provide for a contingent several liability for assessment of the subscriber as an inter-insurer on the risks of every other subscriber in an amount not less than one nor more than ten times the amount of and in addition to the annual premium expressed in such contracts of insurance issued to the subscriber by the reciprocal insurer, is valid and applies to the contracts exchanged by the plaintiffs affecting property in the State of New York.

Found. H. E. S., J. S. C.

17. Section 418, Subsection 1, of the Insurance Law, requiring every subscriber to accumulate a minimum operating reserve, by crediting the subscriber each year with not less than one-quarter of such subscriber's earnings as an underwriter during such period, until the subscriber has accumulated the greater of these two sums (a) twice the amount of his premium, (b) his pro-rata share of an ag- [fol. 210] gregate reserve of one-half per centum of the aggregate amount of an insurance in force, is valid, and applies to contracts exchanged in connection with business done by the plaintiffs in this State.

Refused. H. E. S., J. S. C.

18. Section 418, Subsection 3, of the Insurance Law, providing that no subscriber shall have a secured or preferred claim against any assets of the reciprocal insurer arising out of the operating reserve, but that such assets shall be available first for the payment of claims of policyholders and creditors, is valid as against the plaintiffs.

Refused. H. E. S., J. S. C.

19. Section 420 of the Insurance Law, requiring the assets of a reciprocal insurer, including subscriber's operating reserve to be held primarily for the payment of all liabilities incurred under the policies or other contracts, and that no part of the surplus funds of the reciprocal insurer shall be subject to the claims of general creditors of an individual subscriber until all policies under which any

such subscriber is obligated have been terminated, and in no event beyond the amount of such subscriber's operating reserve; and which requires the surplus of policyholders to be reported as follows: 1. Special contingent surplus: 2. Subscribers' operating reserves; 3. All other surplus, if any, is valid as against the plaintiffs.

Found. H. E. S., J. S. C.

20. Section 421 of the Insurance Law, requiring the attorney in fact to credit the account of each subscriber with the premiums earned by him as an underwriter on the [fol. 211] policies issued by the exchange, and charged with the proper share of the losses incurred under such policies as well as with the expenses incurred by the insurer, is valid as against the plaintiffs.

Refused in form. Valid in part and invalid in part. H. E. S., J. S. C.

21. That the statutes alleged in both complaints are not repugnant to the Constitution of the State of New York or of the United States.

Refused in form. H. E. S., J. S. C.

22. The Education Law of the State of New York, Section 1449, Subsection 6, reads:

"A person practices professional engineering, within the meaning and intent of this article, who holds himself out as able to perform, or who does perform any professional service, such as consultation, investigation, evaluation, planning, design, or responsible supervision or construction or operation, in connection with any public or private utilities, structures, buildings, machines, equipment, processes, works, or projects, wherein the safeguarding of life, health or property is concerned or involved, when such professional service requires the application of engineering principles and data."

The "engineers" mentioned in the complaints and evidence are not licensed under the provisions of the Education Law of the State of New York.

Found. H. E. S., J. S. C.

Dated, March 31, 1941.

Harry E. Schirick, Justice of Supreme Court.

[fol. 212] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

HOOPESTON CANNING CO., a corporation, E. PRITCHARD, INC., a corporation, LANSING B. WARNER, INCORPORATED, a corporation, HARRY M. BROWN and JAMES T. SMITH, Plaintiffs,

v.

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York, Defendants

HOOPESTON CANNING CO., a corporation, E. PRITCHARD, INC., a corporation, LANSING B. WARNER, INCORPORATED, a corporation, PAUL E. EMERSON and BEN A. MORTON, Plaintiffs,

v.

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York, Defendants

JUDGMENT—Entered April 5, 1941

[fol. 213] The above entitled actions, having been consolidated and regularly brought on for trial before me at the County Courthouse in the City of Albany, New York, on the 26th and 27th days of March, 1940, at a Trial Term of the Supreme Court; and the plaintiffs Hoopeston Canning Co., E. Pritchard, Inc., Lansing B. Warner, Incorporated, Harry M. Brown, James T. Smith, Paul E. Emerson and Ben A. Morton, having appeared by Wiswall, Walton, Wood and MacAffer, their attorneys, Zane, Trueblood & Johnsin, of counsel; and the defendants Louis H. Pink, as Superintendent of Insurance of the State of New York, and John J. Bennett, Jr., as Attorney-General of the State of New York, having appeared by John J. Bennett, Jr., Vincent Kiebala, of counsel; and the proofs and allegations of the parties appearing, as aforesaid, having been heard and due deliberation having been had; and the Court having duly rendered and filed its decision herein directing the entry of judgment as hereinafter provided, and made findings of fact and conclusions of law;

Now on Motion of the Court, it is

1. Adjudged and Declared that Section 130 of the Insurance Law of 1939 by its terms applies only to contracts

issued, delivered or otherwise effectuated in the State of New York, and therefore has no application to the contracts of inter-insurance mentioned in the evidence, and that the application of said statute to future transactions shall be left open to be determined as such issue may in the future arise; and it is further

[fol. 214] 2. Adjudged and Declared that Section 168 Subsection 2, of the Insurance Law of 1939, which provides for the use of the standard policy form, permits certain leeways under Subsection 2 (e); that the description of Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers at the beginning of each contract of Inter-insurance used by the plaintiffs is authorized by Subsection 2 (a); that said Section 168, Subsection 2, is invalid as against the plaintiffs in the following particulars: the provision for the insertion of a cash premium is inapplicable to plaintiffs' type of inter-insurance, and plaintiffs may not be compelled to introduce such false provision; that the contracts of inter-insurance used by the plaintiffs contain a provision that the Subscribers are severally, not jointly, liable, which paragraph is generally authorized by Subsection 2 (e), except that the complete negation of joint liability may run contrary to other provisions of the law establishing surplus and reserve funds, and similar sections hereinafter mentioned; that if such sections are valid, this paragraph must be amended so as to add a proviso covering such funds; that where the standard policy refers to "company's option" (lines 176-7), the plaintiff may not be prohibited from changing this to read "Subscriber's option," so as to correspond to realities. That with the exceptions herein noted the said statute is valid as against the plaintiffs and not repugnant to the Constitutions of the State of New York or of the United States; and it is further.

3. Adjudged and Declared that that part of Section 410, Subsection 1, of the Insurance Law of 1939, which defines [fol. 215] the term "Advisory Committee" (the last sentence thereof), is rendered meaningless as applied to plaintiffs' Appointment of Agent and Power of Attorney (Exhibits 5 and 6), and has no application thereto, and that as thus interpreted, the said statute, as against the plaintiffs,

is valid and not repugnant to the Constitutions of the State of New York or of the United States; and it is further

4. Adjudged and Declared that Section 412, Subsection (1), of the Insurance Law of 1939, is invalid as against the plaintiffs and repugnant to the Constitutions of the State of New York and of the United States; and it is further

5. Adjudged and Declared that that part of Section 413, Subsection 2, of the Insurance Law of 1939, which requires plaintiffs to accumulate and maintain a special contingent surplus or guarantee surplus at the rate of one per cent. of the subscriber's alleged net premium income for each year until an amount is accumulated at least equal to the amount of minimum surplus required to be built up, to wit, Two Hundred Fifty Thousand Dollars, without providing for the separate ownership thereof, and provides that the contingent surplus shall not be impaired or paid out by dividend, distributions or by returns of continuing or retiring Subscribers' reserves or deposits, except in the event of liquidation, is valid as against the plaintiffs and not repugnant to the Constitutions of the State of New York or of the United States; and it is further

6. Adjudged and Declared that that part of Section 415, Subsection 1, of the Insurance Law of 1939, which re-
[fol. 216] quires Subscribers to execute all Powers of Attorney and Appointments of Agent in a manner sufficient for the acknowledgment of conveyances of real property to be recorded in the state in which the Subscriber is domiciled, is valid as against the plaintiffs and not repugnant to the Constitutions of the State of New York or of the United States; and it is further

7. Adjudged and Declared that that part of Section 415, Subsection 1 (d), of the Insurance Law of 1939, requiring that the Power of Attorney and Appointment of Agent shall provide for an annual meeting of the Subscribers at which each Subscriber shall have power to vote in person or by proxy for all members of the Advisory Committee to be chosen or appointed at such time, is valid as against the plaintiffs and not repugnant to the Constitutions of the State of New York or of the United States; and it is further

8. Adjudged and Declared that that part of Section 417, Subsection 1, of the Insurance Law of 1939, which requires that every contract of inter-insurance and every Power of Attorney and Appointment of Agent under which contracts of inter-insurance are issued or exchanged shall provide for a contingent, several liability for assessment of the Subscriber as an inter-insurer on the risks of every other Subscriber in an amount of not less than one nor more than ten times the amount of, and in addition to, the alleged annual premium (which the Court holds should more accurately read "annual deposit"), is valid as against the [fol. 217] plaintiffs and not repugnant to the Constitutions of the State of New York or of the United States; and it is further

9. Adjudged and Declared that Section 418, Subsection 1, of the Insurance Law of 1939, is invalid and void as against the plaintiffs and repugnant to the Constitutions of the State of New York and of the United States; and it is further

10. Adjudged and Declared that Section 418, Subsection 3, of the Insurance Law of 1939, is invalid and void as against these plaintiffs and repugnant to the Constitutions of the State of New York and of the United States; and it is further

11. Adjudged and Declared that Section 420 of the Insurance Law of 1939 is valid as against the plaintiffs and not repugnant to the Constitutions of the State of New York or of the United States; and it is further

12. Adjudged and Declared that that part of Section 421 of the Insurance Law of 1939, which refers to "premiums earned by him" and "operating reserve," is invalid and void as against the plaintiffs and repugnant to the Constitutions of the State of New York and of the United States; that that part of the said statute which requires the Attorney-in-Fact or Agent to maintain a separate account for each Subscriber is valid as against the plaintiffs and not repugnant to the Constitutions of the State of New York or of the United States; and it is further

13. Adjudged and Declared that that part of Section 422, Subsection 1, of the Insurance Law of 1939, relative to [fol. 218] reciprocal insurers maintaining at least one office

in the State of New York, and that part of Section 40, Subsection 4, of the said law, relative to the license stating a place of business in the said state, are valid as against the plaintiffs and not repugnant to the Constitutions of the State of New York or of the United States; and it is further

14. Adjudged and Declared that the defendants, their employees, agents and attorneys be perpetually restrained and enjoined from enforcing or attempting to enforce in any manner whatsoever those provisions of the Insurance Law of 1939 of the State of New York herein held to be either invalid or inapplicable as against the plaintiffs and the Subscribers exchanging contracts of inter-insurance under the designations of Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers.

Dated, March 31, 1941.

Enter:

Harry E. Schirick, Justice of the Supreme Court.

Dated, April 5, 1941.

W. B. Clarke, Clerk.

[fol. 219] In Supreme Court of New York, Albany County

Hoopeston Canning Co., a Corporation; E. Pritchard, Inc., a Corporation; Lansing B. Warner, Incorporated, a Corporation; Harry M. Brown and James T. Smith, Plaintiffs,

against

Louis H. Pink, as Superintendent of Insurance of the State of New York, and John J. Bennett, Jr., as Attorney-General of the State of New York, Defendants.

Hoopeston Canning Co., a Corporation; E. Pritchard, Inc., a Corporation; Lansing B. Warner, Incorporated, a Corporation, Paul E. Emerson and Ben A. Morton, Plaintiffs,

against

Louis H. Pink, as Superintendent of Insurance of the State of New York, and John J. Bennett, Jr., as Attorney-General of the State of New York, Defendants.

[fol. 220] Wiswall, Walton, Wood & MacAffer, Esqs., for plaintiffs.

Zane, Trueblood & Johnson, Esqs., of counsel.

John J. Bennett, Jr., Attorney-General for defendants.

Vincent Kiebala, Assistant Attorney-General, of Counsel.

Two actions have been tried together, before the Court without a jury. The action in which Ben A. Morton is a party plaintiff will, for convenience, be referred to as the first action. The action in which James T. Smith is a plaintiff will, for like reason, be referred to as the second action.

The first action is brought on behalf of approximately twenty-one hundred persons, firms, and corporations, of whom some two hundred and thirty are residents of the State of New York. All of these persons are engaged in the wholesale grocery business, Since 1912 they have obtained insurance against loss by fire by a system of reciprocal insurance devised and operated by the plaintiff, Lansing B. Warner, Inc., an Illinois corporation. The system contemplates that each member, called a "subscriber," exchange contracts of insurance with every other member of the group. The agency through which the exchange is effected is Lansing B. Warner, Inc., as attorney in fact. The group is designated as Warner Reciprocal Insurers. The group is not associated nor united in any [fol. 221] manner, save in the common aim to secure this type of insurance. One seeking to obtain such insurance must file an application with the Agent in Chicago, and execute a document known as Appointment of Agent. By virtue of this appointment, the agent, Lansing B. Warner, Inc., is authorized to execute, in his behalf, contracts of insurance. The Agent selects the individuals, firms, or corporations to be admitted to the scheme. It maintains a staff to service the risks. It receives proofs of loss and is empowered to compromise and pay claims.

Annually each subscriber makes a "deposit" with the Agent of a sum which roughly corresponds with the premium which would be charged by an "old line" company upon a similar risk. Title to such deposit remains in each subscriber. The liability of each subscriber is several, and is limited in amount to the sum deposited by him, and also the amount of his "reserve." The liability of each subscriber on any loss is fixed by the ratio of that subscriber's deposit to the total deposits. The Agent retains twenty percent of the deposit as its compensation, out of which operating expenses must be paid. That portion of the deposit which remains unused after the payment

of losses and agent's compensation each year is known as a "saving." A portion of this is used to build up a reserve fund. One-fifth of it is given to the Agent as an additional compensation. The balance is annually returned to the subscriber.

The Appointment of Agent provides for the appointment of "Advisers." These meet periodically. Their functions are largely limited to the deposit and investment of assets, [fol. 222] and the countersigning of checks. They do not supervise the Agent, nor do they exercise authority over him. The Agent is the ultimate power in the scheme.

The second action involves a similar reciprocal insurance group. This group is composed of nine hundred seventy-six persons, firms and corporations, engaged in the canning industry. Ninety-three of these are located in New York State. This group is known as Canners Exchange Subscribers at Warner Inter-Insurance Bureau. This group, with minor exceptions, is identical in operation with the Warner Reciprocal Insurers.

By virtue of Chapter 882 of the Laws of 1939, the Insurance Law of the State of New York, was extensively revised. Various provisions were enacted which purport to regulate the activities of reciprocal insurers. The plaintiffs maintain that such regulation may not constitutionally be applied to them. They assert that if applied to them, these provisions would constitute a deprivation of their property without due process of law. The actions have been brought for a declaratory judgment declaring such provisions to be invalid as against the plaintiffs and for an injunction restraining the defendants from enforcing such law.

Lansing B. Warner, Inc., as agent or attorney in fact, of both groups, has been extremely zealous to localize the activities of these groups in the City of Chicago, Ill.

Application blanks, and blank forms for a power of attorney, are mailed to the prospective subscribers from the Chicago office. These are returned to Chicago by mail. [fol. 223] To determine such prospect's eligibility, the Attorney-in-Fact makes an investigation of his credit rating and reputation for honesty. A trained insurance engineer is sent out from Chicago to inspect the property and report his findings. He also may advise the prospective subscriber as to the methods whereby the risk may be de-

creased. Existing subscribers are consulted regarding the desirability of admitting the applicant to the scheme.

If satisfied with his qualifications, the Attorney-in-Fact accepts the applicant's Power of Attorney. Thereupon, he executes a contract of inter-insurance, and mails it to him from Chicago. The deposit is sent to Chicago by mail.

Once the power of attorney has been executed and accepted, it continues in force until revoked. The subscribers in both groups have been fairly constant. New applications are not frequent.

Losses are paid at the discretion of the Attorney-in-Fact and checks are sent by mail from the Chicago office. In the event of an unusual loss, an inspector is sent to view the property. He has no authority to enter into an adjustment.

There are no agents. New applications are not solicited, save such recommendations as a subscriber may make to his friends and associates. It is not disputed that the record of these groups has been high, both in their financial standings, and in their payment of losses. It is conceded that the subscribers have saved from thirty to fifty per cent in their fire insurance by reason of their use of this method of reciprocal insurance. The reasons for such savings are mainly two: 1) the elimination of the [fol. 224] agency system, with its costly commisions, 2) careful selection of subscribers, resulting in a lower loss ratio than among ordinary companies.

Both groups are licensed to transact insurance business in the State of Illinois. Since 1930 they have been also licensed in New York. This has been done, the plaintiffs assert, to secure two advantages: 1) the appointment of the Superintendent of Insurance as agent for the service of process in New York, and 2) the filing of annual financial statements. They deny that they have been under any obligation to secure such license. Since 1936, they have been paying a tax upon their net income received from subscribers in New York State, though not admitting the validity of such tax.

It is stipulated that their activities have been in a substantial compliance with the law as it existed prior to the enactment of the Insurance Law of 1939. It is stated in the complaints in both actions that they are desirous of qualifying under the valid provisions of the new law and of securing a license thereunder.

The following provisions of the Insurance Law are here challenged:

Sec. 130 (1) "Except as provided in subsection two, no licensed foreign or alien insurer shall in this state issue, deliver or otherwise effectuate any contract of insurance covering either persons resident in this state or property situated in this state, or covering any risk incident to the performance or non-performance of any contract or obligation to be performed in this state, or covering any risk incident to any obligation or duty which is governed by the laws of this state though actually to be performed else- [fol. 225] where, unless such contract of insurance is issued or effectuated through, or countersigned by, a resident licensed insurance agent of this state. Within the meaning of this section, a licensed individual insurance agent shall be deemed to be resident in this state if he has his domicile or his principal place of business in this state, and a licensed corporation insurance agent shall be deemed to be resident in this state if it maintains a lawfully established place of business in this state; and a licensed firm or association insurance agent shall be deemed to be resident in this state if it maintains an established place of business in this state."

Sec. 168 (2) "No policy or contract of fire insurance, including a renewal of such policy or contract, shall be made, issued or delivered by any insurer or by any agent or representative thereof, on any property in this state, unless it shall conform in all particulars as to size of type, as to location of blank spaces, and as to all provisions, agreements and conditions, with such printed blank form of policy (the standard form of the National Convention of Insurance Commissioners); and no other or different provision, agreement or condition shall be in any manner made a part of such contract or policy, except as follows:"

Sec. 410 (f) "Within the meaning of this chapter the term 'reciprocal insurer' shall mean any aggregation of persons, firms or corporations, herein called 'subscribers,' who or which under a common name engage in the business of inter-insurance or exchanging contracts of insurance on [fol. 226] the reciprocal plan through an attorney-in-fact having authority to obligate the subscribers severally, within such limits as may lawfully be specified in the power

of attorney, on contracts of insurance made with any subscriber as a policyholder through such attorney-in-fact acting on behalf of all other subscribers. For the purposes of this chapter, the term 'reciprocal insurer' shall include any reciprocal or inter-insurance exchange, by whatever name known, and any reference thereto as an insurer shall be deemed to mean any such aggregation of inter-insurers operating through an attorney-in-fact individually and collectively as an insurance organization for the benefit of its policyholders. The term 'advisory committee' as used in this chapter, shall be deemed to include any official body, by whatever name called, which is chosen by the subscribers of a reciprocal insurer, and which has, subject to the aticles of association and subscribers' agreement, ultimate power and responsibility and control of the affairs of a reciprocal insurer."

Sec. 412 (1) "No authorized reciprocal insurer shall make any new agreement for insurance with any person, firm or corporation who or which does not have assets in his, their or its own right in an amount not less than ten thousand dollars in excess of liabilities, as shown by a commercial agency report, as hereinafter provided, or by a sworn statement on file with the attorney-in-fact, verified by such subscriber or by an officer of a corporation subscriber.

Before renewing a contract of insurance with a subscriber, similar proof of financial responsibility shall be [fol. 227] required unless the subscriber has accumulated and maintains the subscriber's operating reserve required by section four hundred eighteen. The report of an established commercial agency having one hundred thousand or more subscribers shall be deemed presumptive evidence of the finaficial condition of a subscriber."

Sec. 413 (2) "Every authorized reciprocal insurer, at the end of the first and every succeeding calendar year following the effective date of this chapter, and in the case of a reciprocal insurer hereafter authorized, at the end of each full calendar year of doing business in this state, shall accumulate and maintain a special contingent surplus or guaranty surplus, by whatever name called, at the rate of one per cent of its net premium income for each such year as reported in its annual statement, until such contingent surplus shall be at least equal to the amount of minimum

surplus required in section four hundred eleven. Such contingent surplus shall not be impaired by dividend distributions or by refunds or returns of continuing or retiring subscribers' reserves or deposits except in the event of the liquidation of such reciprocal insurer under order of a court. Any such reciprocal insurer may set aside the entire amount of the contingent surplus herein required or accumulate such surplus at a rate in excess of that herein required; but such contingent surplus once set aside, shall be thereafter maintained unimpaired except as to the amount, if any, in excess of the minimum surplus required by section four hundred eleven."

[fol. 228] Sec. 415: (1) "Every subscriber of an authorized reciprocal insurer shall have executed a subscriber's agreement, and every subscriber hereafter executing such a subscriber's agreement shall execute and duly acknowledge the same, in a manner sufficient for the acknowledgment or conveyances of real property to be recorded in the state in which such subscriber is domiciled, and every subscriber's agreement shall be identical in terms, except as to the date and the name and address of the subscriber, with all other subscriber's agreements currently in force and effect with all other subscriber's of such reciprocal insurer. Every such subscriber's agreement shall contain in substance the following provisions:

* * * * * * *

(d) A provision that there shall be an annual meeting of the subscribers, in person or by proxy, at a time and place to be determined in accordance with such agreement, of which each subscriber shall be duly notified and at which each subscriber shall have power to vote in person or by proxy for all members of the advisory committee to be chosen or appointed at such time."

Sec. 417: (1) "Every contract of insurance and every power of attorney of the attorney-in-fact or subscriber's agreement under or by which contracts of insurance are issued or exchanged by any authorized reciprocal insurer shall provide for a contingent several liability for assessment of the subscriber as an inter-insurer on the risks of every other subscriber in an amount not less than one [fol. 229] nor more than ten times the amount of and in

addition to the annual premium expressed in such contracts of insurance issued to the subscriber by the reciprocal insurer."

Sec. 418: 1. "Every subscriber of an authorized reciprocal insurer shall be required to accumulate a minimum operating reserve, to be credited to such subscriber on the books and records of such reciprocal insurer, by authorizing the attorney-in-fact to credit to such account at the end of the fiscal year of such reciprocal insurer, an amount not less than one quarter of such subscriber's earnings as an underwriter during such period. Such accumulation shall be made if and at least so long as such subscriber's operating reserve is less than the larger of the following amounts: (a) Twice the amount of the annual premium or premiums in force as of such date on all policies issued to such subscriber by the reciprocal insurer; or (b) such subscriber's pro rate share, determined on the basis of annual premium in force, of an aggregate operating reserve for such reciprocal insurer equal to one-half of one per cent of the aggregate amount of fire insurance in force in such reciprocal insurer as of such date."

3. "No subscriber shall have a secured or preferred claim against any assets of the reciprocal insurer arising out of such operating reserve, but all assets held by such insurer shall be available for the payment of claims of policyholders any creditors of such a reciprocal insurer in preference to any claim for withdrawal by a subscriber as such. Any [fol. 230] subscriber's operating reserve accumulated by any such reciprocal insurer shall be maintained at all times, except that a subscriber may, upon withdrawal from membership and cancellation of all insurance contracts held by him in such insurer, and after giving to the attorney-in-fact written notice of withdrawal at least sixty days in advance, withdraw the amount of his operating reserve less such surrender charges as may be deducted pursuant to the subscriber's agreement. No such withdrawal shall be permitted after an order of liquidation, of, or the appointment of a receiver or liquidating trustee for, any such reciprocal insurer."

Sec. 420: "All of the assets of any reciprocal insurer including subscribers' operating reserves shall be liable primarily for payment of all liabilities incurred under its

policies or other contracts. No part of the surplus funds of such reciprocal insurer shall be subject to the claims of general creditors of any of the individual subscribers of such insurer until all policies under which any such subscriber is obligated have been terminated and in no event beyond the amount of such subscriber's operating reserve. The contingent liability of subscribers for additional premiums or assessments shall not be included as an asset in the financial statement of a reciprocal insurer. Subscribers' operating reserves for which notice of withdrawal has been given shall be reported as liabilities until paid. In any statement or report of the financial condition of a reciprocal insurer filed in this state, the surplus to policyholders, after providing for the unearned premium reserves, loss reserves and other liabilities, as required by this chap- [fol. 231] ter, shall be reported as follows: 1. Special contingent surplus; 2. Subscribers' operating reserves; 3. All other surplus, if any."

Sec. 421: "The attorney-in-fact, in addition to the books of account of the collective transactions of all subscribers of the reciprocal insurer, shall keep and maintain a separate account for each individual subscriber, setting forth the entries determining the operating reserve, if any, of such subscriber. Each subscriber's account shall be credited with the premiums earned by him as an underwriter on the policies issued by the exchange and charged with his proper share of all losses incurred under such policies as well as with the expenses incurred by the insurer. Earnings and interest income from investments of all subscribers' operating reserves shall be apportioned and credited to subscribers on the basis of their accumulated operating reserves and all other interest and investment income may be apportioned and credited to the subscribers on the basis of their premiums earned as underwriters."

Sec. 422: 1. "The superintendent may, in his discretion, pursuant to section forty-two, issue a license to a reciprocal insurer domiciled in, or organized under the laws of another state or of any province of the Dominion of Canda, to do in this state such kind or kinds of insurance business as a domestic reciprocal insurer may be authorized to do in this state. Such foreign or alien reciprocal insurer shall comply with substantially the same requirements of this chapter

[fol. 232] which are applicable to domestic reciprocal insurers hereafter to be organized and authorized to do the same kind or kinds of insurance business and in addition every such alien reciprocal shall be subject to the provisions of this chapter relating to alien insurance companies authorized to do the same kind or kinds of insurance business. Nothing herein contained shall be deemed to require that the attorney-in-fact of a foreign or alien reciprocal insurer shall be resident or domiciled in this state, or shall maintain his or its principal office in this state, or shall be organized under the laws of this state; but every authorized reciprocal insurer shall maintain at least one office in this state."

Sec. 40: 4. "The superintendent may issue a license to any insurer to do in this state the kind or kinds of insurance business for which such insurer is qualified under the provisions of this chapter and under its charter. Every such license shall contain the name of the licensee, its home office address, its principal place of business in this state, the state or country under whose laws it was organized or incorporated, the kind or kinds of insurance business, as definded in this chapter, which it is authorized to do in this state, and the term of such license. The superintendent may refuse to issue or renew any such license if in his judgment such refusal will best promote the interests of the people of this state."

The attack upon the validity of this legislation is based upon the Fourteenth Amendment of the Constitution of the United States, the relevant part of which reads as follows:

[fol. 233] "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It has been established by the Supreme Court of the United States that a corporation is not a citizen within the meaning of the equal immunities clause. Paul v. Virginia, 8 Wall. 168.

Corporations do, however, come within the protection of the due process clause. Connecticut General Life Ins. Co. v. Johnson, 303 U. S. 77.

It is contended by the plaintiffs that this legislation and the determination of the defendants to enforce it, constitute a violation of the due process clause. This contention is put forward upon two grounds:

First. That the State of New York has no jurisdiction over the activities of the plaintiffs and therefore may not regulate them.

Second. That even if the State had jurisdiction, the regulations which are attacked are arbitrary and unreasonable and without any reasonable relation to the object sought to be attained.

These two grounds deserve and will receive separate consideration.

First, the Court will consider the question of the jurisdiction of the State of New York over these plaintiffs.

It has not been, and cannot be, disputed that the docu- [fol. 234] ments exchanged by the plaintiffs are insurance contracts; nor that the exchange of them constitutes the carrying on of insurance business. People v. Roschli, 275 N. Y. 26.

Neither can it be seriously disputed, in view of the authorities, that the contracts exchanged by the plaintiffs are Illinois contracts. The applications are received in Chicago and they are accepted there. Policies are mailed from Chicago. This makes them, as a matter of law, Illinois contracts of insurance. Minnesota Assn. v. Benn., 261 U. S. 140; Huntington v. Sheehan, 206 N. Y. 486; Stone v. Penn Yan, K. P. & B. Railway, 197 N. Y. 279.

The questions remaining to be considered upon the matter of jurisdiction are 1) whether the plaintiffs are doing business within this state, and 2) whether the State of New York has other interests in these policies, sufficient to justify their regulation.

The evidence discloses the following acts in relation to these policies performed in New York State:

When a canner or wholesale grocer, resident of New York, applies for insurance under this reciprocal scheme, an engineer is sent from the Chicago office. He inspects the property in this state. He explains the operation of the plan. He may have an application blank in his possession and if so, may deliver it to the applicant. Upon acceptance of the application, these engineers "service" the risk.

This term is insurance jargon, having reference to the giving of advice, prepaartion of plans, and other activities which have the purpose of minimizing the risk of fires. In [fol. 235] the event of an unusual loss in this state, an inspector is sent from Chicago to examine the premises, in order to determine its etxent, and also to discover the cause of the fire, in order that future losses from the same cause may be prevented.

These activities, in the opinion of the Court, are such as to constitute doing business in this state. In reaching this conclusion, the Court puts out of its consideration the fact that the plaintiffs are licensed to do business here. Concededly, a license to do business is not equivalent to doing business. The license may or may not be used. People ex rel. Sea Island Insurance Co. v. Graves, 274 N. Y. 312.

In Thomas Canning Co. v. Canners Exchange, 219 Mich. 214, some of the plaintiffs herein were involved. The Court stated, page 222:

"In the name adopted by 'such subscribers contracting among themselves' they have, through their attorney, qualified to carry on their co-operative system of insurance in this State. To the extent the attorney directly or through authorized agents operates in this State by soliciting applications from subscribers for insurance on property within the State, inspects and appraises such property for that purpose, issues and delivers policies, investigates and pays or adjusts losses through its representative adjuster, or engages in that connection in other insurance activities, it is doing business in this State regardless of whether the policies it issues are to be construed as contracts made in this or another State. Seamans v. Temple Co., 105 Mich. 400 (28 L. R. A. 430, 55 Am. St. Rep. 457)."

[fol. 236] The Court would be of this opinion even if the plaintiffs were entities, like corporations, resident of Illinois. The plaintiffs insist, however, that they are not. The names, Warner Reciprocal Insurers, and Canners Exchange Subscribers at Warner Inter Insurance Bureau, are merely convenient terms, they insist, to designate those individuals, firms and corporations which have appointed a common agent or attorney-in-fact to exchange policies of fire insurance. This being so, the acts of the individual members, in reference to such insurance, consummated in this state, must be taken into consideration in weighing the issue.

whether the plaintiffs are doing business in New York. The plaintiffs cannot at the same time "blow hot and cold." Various such acts take place in this state. The reciprocal plan is suggested and recommended by resident subscribers to friends and associates. Questions propounded by the Attorney-in-Fact as to the reputation and standing of applicants are here answered. These are activities of the plaintiffs, and constitute the transaction of insurance business in this state.

The plaintiffs have cited a long line of cases showing that certain acts within a state do not amount to doing business therein. These cases have been carefully examined by the Court and they appear to be clearly distinguishable by reason of one important feature. That is, that the acts done within the state in those cases were done not by the insurance companies, nor by anyone authorized to act on their behalf, but by the insured, or the representatives of the insured.

[fol. 237] Thus in the leading case of Allgeyer v. Louisiana, 165 U. S. 578, the act done within the state was the mailing of a notice describing cargoes to be shipped, for the purpose of effecting their inclusion under an open marine policy. This act was performed not by the insurance company or its agent, but by the insured.

In N. Y. Life Ins. Co. v. Dodge, 246 U. S. 357, as in N. Y. Life Ins. Co. v. Head, 234 U. S. 149, which the Dodge case follows, all acts by the insurance company with reference to the loan agreement were performed elsewhere. All the acts done within the state with reference to such agreement were performed by the insured.

In People v. Van Amridge, 266 N. Y. 277, the acts done by the labor union, pursuant to the terms of a group life insurance policy, were done on behalf of its members, the insured, and not on behalf of the insurer. The activities of the insurance company were limited to the District of Columbia, so far as the policy was concerned.

It may be contended however, that even if the plaintiffs are doing business within the State of New York, this does not justify the regulation sought to be imposed; that the doing of business within a state offers no valid ground for the regulation of business done without the state, nor can a state, as a condition for the granting of a license to do business therein, compel a corporation to submit to control of

its transactions elsewhere. It is a principle firmly established in our constitutional law, that a state cannot use a conceded power in order to accomplish an unconstitutional result.

[fol. 238] In Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426, 434, Justice Holmes states the principle as follows:

"Coming then to the merits, we assume in favor of the defendants that the State has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absoute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result. Frick v. Pennsylvania, 268 U. S. 473. American Bank & Trust Co. v. Federal Reserve Bank of Atlanta, 256 U. S. 350, 358. Badders v. United States, 240 U. S. 391, 394. United States v. Reading Co., 226 U. S. 324, 357. Thus the right to exclude a foreign corporation cannot be used to prevent it from resorting to a federal court. Terral v. Burke Construction Co., 257 U. S. 529; or to tax it upon property that by established principles the State has no power to tax, Western Union Telegraph Co. v. Kansas, 216 U. S. 1, and other cases in the same volume and later that have followed it; or to interfere with interstate commerce, Sioux Remedy Co. v. Cope, 235 U. S. 107, 203; Looney v. Crane Co., 245 U. S. 178, 188. Western Union Telegraph Co. v. Foster, 247 U. S. 105, 114. A State cannot regulate the conduct of a foreign railroad corporation in another jurisdiction, even though the Company has tracks and does business in the State making the attempt. New York, Lake Erie & Western R. R. Co. v. Pennsylvania, 153 U. S. 628, 646."

[fol. 239] See also N. Y. Life Ins. Co. v. Head, 234 U. S. 149; N. Y. Life Ins. Co. v. Dodge, 246 U. S. 357; Matter of Factory Mutual Liability Ins. Co. v. Behan, 233 A. D. 614.

The plaintiffs assert that New York State may not validly regulate an insurance contract entered into outside its borders, although such contract insures New York property. This position is based upon a long line of decisions by the Supreme Court of the United States, starting with Allgeyer v. Louisiana, 165 U. S. 578.

The Allgeyer case involved a Louisiana statute which imposed a penalty for every act done within the state, in aid of, or to effectuate insurance upon property in the state in any marine insurance company which had not complied with the laws of Louisiana. It was attempted to apply this statute to a case where an open marine policy had been executed in New York. Allgeyer, the insured, had sent a notice by mail from Louisiana to the insurer in New York, describing a cargo about to be shipped. Such notification was required by the policy to secure coverage. The Court held that the imposition of a penalty for such act was unconstitutional. It was held that the letter of notification did not constitute a contract entered into in Louisiana. It was "but the performance of an act rendered necessary by the provisions of the contract already made between the parties outside the State." Louisiana citizens were protected by the Fourteenth Amendment in their right to enter into contract wherever they pleased, as did the New York insurer to enter into contracts in New York covering property in Louisiana. At pages 590-1, the Court states:

[fol. 240] "Has not a citizen of a State, under the provisions of the Federal Constitution above mentioned, a right to contract outside of the State for insurance on his property—a right of which state legislation cannot deprive him? We are not alluding to acts done within the State by an insurance company or its agents doing business therein, which are in violation of the state statutes. Such acts come within the principle of the Hooper case (supra) and would be controlled by it. When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside the State, and as such was a valid and proper contract. The act done within the limits of the State under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the state legislature had no right to prevent, at least with reference to the Federal Constitution. To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the Federal Con-

stitution the defendants had a right to perform. This does not interfere in any way with the acknowledged right of the State to enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the Federal Constitution."

[fol. 241] Concluding, at page 593, the Court states:

"In such a case as the facts here present the policy of the State in forbidding insurance companies which had not complied with the laws of the State from doing business within its limits cannot be so carried out as to prevent the citizen from writing such a letter of notification as was written by the plaintiffs in error in the State of Louisiana, when it is written pursuant to a valid contract made outside the State and with reference to a company which is not doing business within its limits."

The principle thus set forth in the Allgeyer case is reiterated in St. Louis Compress Co. v. Arkansas, 260 U. S. 346. Under consideration in that case was a tax imposed by the State of Arkansas, on the gross premiums paid by the insured for the insurance of domestic property in a company not authorized to transact business within the state. In holding such tax invalid, the Court stated (Holmes, J., page 348):

"The short question is whether this so-called tax is saved because of the name given to it by the statute when it has been decided in Allgeyer v. Louisiana, 165 U. S. 578, that the imposition of a round sum, called a fine, for doing the same thing, called an offense, is invalid under the Fourteenth Amendment. It is argued that there is a distinction because the Louisiana statute prohibits (by implication) what this statute permits. But that distinction, apart from some relatively insignificant collateral consequences, is merely in the amount of the detriment imposed upon doing the act. The name given by the State to the impo-
[fol. 242] sition is not conclusive. Child Labor Tax Case, 259 U. S. 20. Lipke v. Lederer, 259 U. S. 557. In Louisiana the detriment was $1,000; here it is five per cent. Upon the premiums—which is three per cent more than is charged

for insuring in authorized companies. Each is a prohibition to the extent of the payment required. The Arkansas tax manifests no less plainly than the Louisiana fine a purpose to discourage insuring in companies that do not pay tribute to the State. This case is stronger than that of Allgeyer in that here no act was done within the State, whereas there a letter constituting a step in the contract was posted within the jurisdiction. It is true that the State may regulate the activities of foreign corporations within the State but it cannot regulate or interfere with what they do outside. The other limit upon the State's power due to its having permitted the plaintiff in error to establish itself as alleged, need not be considered here. Southern Ry. Co. v. Greene, 216 U. S. 400, 414; Cheney Brothers Co. v. Massachusetts, 246 U. S. 147, 157; Northwestern Mutual Life Insurance Co. v. Wisconsin, 247 U. S. 132, 140."

This rule has been applied in many decisions of the Supreme Court. See Aetna Life Insurance Co. v. Dunken, 260 U. S. 389; Minnesota Association v. Benn, 261 U. S. 140. The courts of the state have also had occasion to subscribe to it. People ex rel. Kirkman v. Van Amridge, 266 N. Y. 277; U. S. Mortgage and Trust Co. v. Ruggles, 258 N. Y. 32; Stone v. Penn Yan K. P. & B. Railway, 197 N. Y. 279; Hammond v. International Railway Co., 63 Misc. 437, aff'd 134 App. Div. 995.

[fol. 243] The doctrine of the Allgeyer case, as applied and amplified in subsequent decisions, is that the presence of the insured person or property within the regulating state is an immaterial circumstance. Such situs does not confer upon a state the power to regulate. Such power is conferred exclusively to the state where the contract was made.

Signs that the doctrine is not of invariable applicability are evident, however, in other adjudications of the Supreme Court.

In Equitable Life Assurance Society v. Pennsylvania, 238 U. S. 143, the constitutional issue was the validity of a franchise tax imposed by the State of Pennsylvania upon insurance companies doing business therein. Included in the measure of the tax were premiums collected without the state upon insurance of residents of Pennsylvania. The

insurance company was licensed in Pennsylvania. The Court sustained the tax, saying, page 146:

"We are dealing with a corporation that has subjected itself to the jurisdiction of the State; there is no question that the State has a right to tax it and the only doubt is whether it may take this item into account in fixing the figure of the tax. Obviously the limit in that regard is a different matter from the inquiry whether the residence of a policy holder would of itself give jurisdiction over the Company. The argument of the state court is that the Company is protecting its insured in Pennsylvania equally whether they pay their premiums to the Company's agent in Philadelphia or by mail or in person to another in New York.

[fol. 244] "These are policies of life insurance and according to the statement of the plaintiff in error are kept alive and renewed to residents of Pennsylvania by payments from year to year. The fact that the State could not prevent the contracts, so far as that may be true, has little bearing upon its right to consider the benefit thus annually extended into Pennsylvania in measuring the value of the privileges that it does grant. We may add that the State profits the Company equally, by protecting the lives insured, wherever the premiums are paid. The tax is a tax upon a privilege actually used. The only question concerns the mode of measuring the tax. Flint v. Stone Tracy Co., 220 U. S. 107, 162, 163. As to that a certain latitude must be allowed. It is obvious that many incidents of the contract are likely to be attended to in Pennsylvania, such as payment of dividends when received in cash, sending an adjuster into the State in case of dispute, or making proof of death. See Connecticut Mut. Life Ins. Co. v. Spratley, 172 U. S. 602, 611; Pennsylvania Lumbermen's Mut. Fire Ins. Co. v. Meyer, 197 U. S. 407, 415. It is not unnatural to take the policy holders residing in the State as a measure without going into nicer if not impracticable details. Taxation has to be determined by general principles, and it seems to us impossible to say that the rule adopted in Pennsylvania goes beyond what the Constitution allows."

Compania de Tabacos v. Collector, 275 U. S. 87, involved the validity of a taxing act of the Philippine Islands. The

tax was imposed upon owners of local property obtaining [fol. 245] insurance thereon in companies not authorized to do business in the Philippine Islands, to the extent of a fixed percentage of the premiums paid. Such percentage was higher than that charged when the insurance was placed with a licensed insurer. Two policies were involved. One was negotiated in Barcelona, Spain, with a London Company. Another was negotiated, also in Barcelona, Spain, with a Paris company. The London company was authorized to do business in the Philippine Islands. The Paris company was not. In both cases, however, the policies had been executed, the premiums paid, and the losses were payable outside the Philippine Islands. The tax was upheld as to the contract secured with the London Company. It was held invalid as to the Paris company policy. As to the latter, the majority of the Court felt themselves bound by the Allgeyer and St. Louis Compress cases. Distinguishing Equitable Life Assurance Society v. Penn (supra) the Court said (page 97):

"The case is not in conflict either with the Allgeyer case or with the Compress case, decided as late as December, 1922. It turns entirely on the fact that the taxpayer had subjected itself to the jurisdiction of Pennsylvania in doing business there, and it was for the state to say what the condition of its doing that business in the matter of the payment of taxes should be. This Court said that the Equitable Society was doing business in Pennsylvania when it was annually paying dividends in Pennsylvania, or sending an adjuster into the state in case of dispute, or making proof of death, and therefore that it was not improper to meas-[fol. 246] ure the tax for doing business in the state by the number of individuals whose lives had been insured and with respect to whom, and the execution of whose contracts, the company was necessarily doing business in the state, even if the premiums paid by some of them had not been paid in the state."

In upholding the tax upon the London company policy, the Court stated, page 98:

"* * * We may properly assume that this tax, placed upon the assured, must ultimately be paid by the insurer, and treating its real incidence as such, the question arises

whether making and carrying out the policy does not involve an exercise or use of the right of the London Company to do business in the Philippine Islands under its license, because the policy covers fire risks on property within the Philippine Islands which may require adjustment, and the activities of agents in the Philippine Islands, with respect to settlement of losses arising thereunder. This we think must be answered affirmatively under Equitable Life Society v. Pennsylvania, 238 U. S. 143. The case is a close one, but in deference to the conclusion we reached in the latter case, we affirm the judgment of the court below in respect to the tax upon the premium paid to the London Company."

Most persuasive in opposition to applying the doctrine of the Allgeyer case, to the case at bar is Osborn v. Ozlin, 310 U. S. 53, decided April 22, 1940. Involved in that case was the validity of a Virginia statute regulating the insurance of Virginia risks. Insurance companies authorized [fol. 247] to do business in that state were forbidden to insure Virginia risks except through regularly constituted and registered agents. Such agents are entitled and shall receive the customary commissions, and may not share more than one-half of such commission with a non-resident broker. The action was brought by foreign corporations authorized to do business in Virginia to restrain the enforcement of the statute. The Supreme Court upheld the law and denied the injunction. Mr. Justice Frankfurter, writing for the majority, stated:

"Virginia has not sought to prohibit the making of contracts outside her borders. She merely claims that her interest in the risks which these contracts are designed to prevent warrants the kind of control she has here imposed. This legislation is not to be judged by abstracting an isolated contract written in New York from the organic whole of the insurance business, the effect of that business on Virginia and Virginia's regulation of it" (P. 62).

The Court proceeds to say, at pages 65-7:

"The present case, therefore, is wholly unlike those instances in which a 'so-called right is used as part of a scheme to accomplish a forbidden result.' Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426, 434. For it is clear that Virginia has a definable interest in the contracts she seeks

to regulate and that what she has done is very different from the imposition of conditions upon appellants' privilege of engaging in local business which would bring within the orbit of state power matters unrelated to any local interests. It is not our province to measure the social ad- [fol. 248] vantage to Virginia of regulating the conduct of insurance companies within her borders insofar as it effects Virginia risks. Government has always had a special relation to insurance. The ways of safeguarding against the untoward manifestations of nature and other vicissitudes of life have long been withdrawn from the benefits and caprices of free competition. The state may fix insurance rates, German Alliance Ins. Co. v. Lewis, 233 U. S. 389, it may regulate the compensation of agents, O'Gorman & Young v. Hartford Fire Ins. Co., 282 U. S. 251; it may curtail drastically the area of free contract, National Ins. Co. v. Wanberg, 260 U. S. 71. States have controlled the expenses of insurance companies, New York Insurance Law, Consolidated Laws of New York, c. 28, Sec. 244, and Wisconsin Statutes, Sec. 201.21; and see Report of Joint (Armstrong) Insurance Investigation Committee (N. Y.), pp. 403-18 (1906). They have also promoted insurance through savings banks; see Berman, The Massachusetts System of Savings Bank Life Insurance, Bulletin No. 615, U. S. Bureau of Labor Statistics, and New York Laws of 1938, 3,471. In the light of all these exertions of state power it does not seem possible to doubt that the state could, if it chose, go into the insurance business, just as it can operate warehouses, flour mills, and other business ventures, Green v. Frazier, 253 U. S. 233; or might take 'the whole business of banking under its control,' Noble State Bank v. Haskell, 219 U. S. 104, 113. If the state, as to local risks, could thus preempt the field of insurance for itself, it may stay its intervention short of such a drastic [fol. 249] step by insisting that its own residents shall have a share in devising and safeguarding protection against local hazards. La Tourette v. McMaster, 248 U. S. 465. All these are questions of policy not for us to judge. For it can never be emphasized too much that one's own opinion as to the wisdom of a law must be wholly excluded when one is doing one's judicial duty. The limit of our inquiry is reached when we conclude that Virginia has exerted its powers as to matters within the bounds of her control.

"In reaching this conclusion we have been duly mindful of the cases urged upon us by appellants. In Allgeyer v. Louisiana, 165 U. S. 578, apart from the doubts that have been cast upon the opinion in that case, the state attempted to penalize the making of contracts by its residents outside its borders with companies which had never subjected themselves to local control. Thus the statute was thought to be directed not at the regulation of insurance within the state, but at the making of contracts without. This was followed in St. Louis Compress Co. v. Arkansas, 260 U. S. 346; but see the refined distinctions drawn in Compania de Tabacos v. Collector, 275 U. S. 87. In Fidelity & Deposit Co. v. Tafoya, supra, the Court found that New Mexico had exceeded its power by forbidding 'the payment of any emolument of any nature to any (non-resident) for the obtaining, placing or writing of any policies covering risks in New Mexico. The Court was of the opinion that this statute went 'beyond any legitimate interest of the state . . .' ibid. at 435, but carefully withheld its judgment as to the validity of a later New Mexico statute not unlike the Virginia law here under review.

[fol. 250] It is obvious that the majority of the Court have departed from restrictive rule of the Allgeyer case. The situs of the insured person or property has become a material factor in the power of a state to regulate or tax. So also has the fact that the corporation challenging the statute is licensed in the state and has thus submitted to regulation.

These factors are both present in the case at bar. The Court concludes that jurisdiction to regulate is not lacking.

This brings under consideration the second ground of attack, addressed to the reasonableness of the regulations. This phase of the inquiry must be approached in the spirit expressed in the Osborn case:

"For it can never be emphasized too much that one's own opinion as to the wisdom of a law must be wholly excluded when one is doing one's judicial duty."

The sections requiring the countersigning of policies by a resident agent (130) and the maintenance of an office in this state (422; subsec. 1, and 40 subsec. 4) may be upheld upon the authority of the Osborn case and for the reasons there stated. The enforcement of regulations is thus fa-

cilitated and the state is enabled to secure better means of acquiring accurate information for the effectuation of measures which it deems protective of its interests. Of course, if the statute does not apply to any particular transaction, the plaintiffs will be free to resist any attempts by the Superintendent of Insurance to enforce it against them. This action, as the Court conceives it, is concerned with the [fol. 251] constitutionality of the law. The plaintiffs' contention that these sections will increase the cost of operation is answered by the following quotation from the Osborn case (page 62):

"But the question is not whether what Virginia has done will restrict appellants' freedom of action outside Virginia by subjecting the exercise of such freedom to financial burdens. The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids. Alaska Packers Assn. v. Comm'n, 294 U. S. 532; Atlantic & Pacific Tea Co. v. Grosjean, 301 U. S. 412. Compare Equitable Life Society v. Pennsylvania, 238 U. S. 143. It is equally immaterial that such state action may run counter to the economic wisdom either of Adam Smith or of J. Maynard Keynes, or may be ultimately mischievous even from the point of view of avowed state policy. Our inquiry must be much narrower. It is whether Virginia has taken hold of a matter within her power, or has reached beyond her borders to regulate a subject which was none of her concern because the Constitution has placed control elsewhere. Compare Wallace v. Hines, 253 U. S. 66, 69."

Next to be attacked is the section (Sec. 168 [2]) providing for the use of the standard policy form. This policy was framed by the Board of Fire Underwriters and obviously did not have reference to reciprocal insurance. The law recognizes this in granting certain leeways. Subdivision 2 (e). The Court has compared the policies issued by the plaintiffs (Exhibits 8 and 10) with the standard form [fol. 252] prescribed by the statute. There are few differences. The description of the insurer, at the beginning of the policy, is authorized by subdivision 2 (a), which provides for printing the name of the insurer or insurers. The provision for the insertion of a cash premium is inapplicable to this type of insurance, and the plaintiffs may not be

compelled to introduce such false provision. The policy used by the plaintiffs contains a provision that the subscribers are severally, not jointly, liable. The paragraph is, generally, authorized by subsection 2 (e), except that the complete negation of joint liability may run contrary to other provisions of the law establishing surplus and reserve funds, and similar sections to be hereafter discussed. If such sections are valid, this paragraph must be amended so as to add a proviso covering such funds. Where the standard policy refers to "Company's Options" (lines 176-7) the plaintiffs may not be prohibited from changing this to read "Subscribers' Option," so as to correspond to realities. With the exceptions here noted, the Court sees nothing unreasonable or arbitrary in the application to the plaintiffs of Sec. 168.

The plaintiffs attack Sections 410 (1) and 415 (1d), dealing with the powers and mode of selection of the advisory committee. It is stated that "subject to the articles of association and the subscribers' agreement" ultimate power and control shall be in such committee. Since the agreement among the plaintiffs contained in the appointment of agent, or attorney, is in negation of such power, this part of Section 410 (1) is rendered meaningless. The statute does [fol. 253] not purport to change the subscribers' agreement in this respect. Thus interpreted, there is nothing to support the claim of unconstitutionality. Section 415 (1d) requiring the selection of advisors by vote cannot be considered an unreasonable regulation.

Section 412 (1) limits new subscribers to those having assets in excess of liabilities in the sum of $10,000. Renewals are limited to those having such assets or, in lieu thereof, have accumulated the operating reserve provided for in Section 418. This provision denies to the small business man the right to secure this type of insurance. Since the uncontroverted proof shows that there is no necessity for such provision, the Court deems it arbitrary, discriminatory, and repugnant to the "due process" clause.

Section 413 (2) provides for the creation of a contingent or guaranty surplus of at least $250,000 which shall not be impaired or distributed except upon liquidation. Apparently this surplus is to be held by the attorney in fact. The creation of such fund is not an unreasonable thing. It is a duty common to all who engage in banking or insurance

business. The plaintiffs cannot hope successfully to challenge this or any other provision merely by pointing out that it differs from the practice hitherto adhered to by them. The necessity for some change is inherent in all regulation.

Section 415 (1), requiring the acknowledgment of the subscribers' agreement, does not appear arbitrary. That it may be more cumbersome or expensive than the present practice is no indication that it is unconstitutional.

[fol. 254] Section 417 (1) provides that every contract shall provide for several liability for assessment. The amount of such liability may be limited by the contract to the amount of the annual "premium" or more accurately, the annual deposit. The Legislature may have deemed this provision essential to the protection of resident subscribers. Neither the nature nor the amount of this liability is such as to support the challenge of invalidity.

Section 418 (1) requires each subscriber to build up an operating reserve, by deducting each year not less than one-quarter of his "earnings as an underwriter," until he has accumulated the greater of these two sums: (a) twice the amount of his premium, (b) his pro rata share of an aggregate reserve of one-half per cent of the aggregate amount of insurance in force. Since there is no such thing in the plaintiffs' scheme as "earnings as an underwriter," this provision is incapable of application. Furthermore, in view of the provisions previously noted, this is an arbitrary discrimination against reciprocal insurers. Ordinary companies are not compelled to accumulate a reserve of double the amount of their annual premiums. It is pointed out in the record (page 87) that such requirement would put many stock companies out of business.

Sections 418 (3) and 430 deal with the priorities between various claims against operating reserves and assets, Section 418 (3) must fall with subsection (1). The procedure for payment provided for in Section 420, may, as contended by the plaintiffs partake of the characteristics of joint liability. This, of itself, is not sufficient to defeat the sec- [fol. 255] tion. The provision, viewed on its merits, appears reasonable.

Section 421 deals with bookkeeping procedure. The attorney in fact is required to keep separate accounts for each

subscriber. The provision for crediting each with "premiums earned by him" are incapable of application, since no premiums are earned. The "operating reserve" provision has already been held invalid. The last sentence of the section is also inapplicable. Insofar as the section requires the attorney in fact to maintain a separate account for each subscriber, it corresponds with the procedure already in use by the plaintiffs, and is a valid provision.

The Court concludes, this lengthy opinion, fully realizing that a fuller exposition of the facts might have cast the law in a different light. Constitutional issues are not readily resolved in vacuo. Provisions which may appear arbitrary on their face often take on a different aspect when the underlying factual situation is fully developed. In the absence of such factual proof, the Court has adhered as closely as practicable to the rule of "presumption of constitutionality," enunciated in O'Gorman & Young v. Hartford Insurance Co., 282 U. S. 251.

Judgment will be granted in conformity with this opinion. Papers and exhibits may be obtained at Chambers in Kingston.

Dated, December 10th, 1940.

[fol. 256] In Supreme Court of New York, Albany County

[Title omitted]

Defendants' Notice of Appeal

[fol. 257] Sirs:

Please Take Notice that the defendants in the above-named actions, heretofore consolidated, hereby appeal to the Appellate Division of the Supreme Court, Third Department, from those portions of the judgment entered in the above-entitled actions in the office of the Clerk of the County of Albany, on the 5th day of April, 1941, being the paragraphs of said judgment numbered 1, 2, 3, 4, 9, 10 and 12, which adjudge and decree that the parts of Section 130, Section 168, Subsection 2, Section 410, Subsection 1, Section

412, Subsection 1, Section 418, Subsection 1, Section 418, Subsection 3, and Section 421 of the Insurance Law of the State of New York (Chapter 882 of the Laws of 1939, being Chapter 28 of the Consolidated Laws) alleged in the complaints in both actions, are invalid; and also from paragraph 14 of said judgment; and this appeal is taken both upon the law and facts.

Dated this 16th day of April, 1941.

Yours, etc., John J. Bennett, Jr., Attorney-General of the State of New York, Attorney for Defendants-Appellants, The Capitol, Albany, New York.

To: Wiswall, Walton, Wood & MacAffer, Esqs., Attorneys for Plaintiffs-Respondents, 90 State Street, Albany, New York. W. B. Clarke, Esq., Albany County Clerk.

[fol. 258] In Supreme Court of New York, Albany County

Stipulation Settling Case and Waiving Certification

It is Hereby Stipulated that the foregoing case contains all the evidence given upon the trial of these actions as consolidated excepting the original exhibits which may be handed up to the Court by any party on the argument of this appeal, and it is further stipulated that the foregoing case may be settled and ordered to be filed, and

It is Further Stipulated, pursuant to Section 170 of the Civil Practice Act that the foregoing case consists of true copies of the notice of appeal of the plaintiffs in each action and notice of appeal of the defendants in each action and of the judgment roll now on file in the office of the Clerk of Albany County and certification thereof by the Clerk of said County pursuant to Section 616 of the Civil Practice Act is hereby waived.

Dated April 22, 1941.

Wiswall, Walton, Wood & MacAffer, Attorneys for Plaintiffs-Appellant and Respondent. Hon. John J. Bennett, Jr., Attorney-General, By Joseph P. Leary, Assistant Attorney for Defendants, Respondent and Appellant.

[fols. 259-260] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

ORDER SETTLING CASE

On reading and filing the foregoing stipulation, the foregoing case containing true copies of the original notice of appeal of the plaintiffs in each action and of the original notice of appeal of the defendants in each action and of the judgment roll in these actions filed in the office of the Clerk of Albany County, and all the evidence given on the trial of thees actions, excepting the original exhibits which may be handed up to the Court by any party on the argument of this appeal, is hereby settled and ordered filed as the case on appeal to the Appellate Division of the Supreme Court, Third Judicial Department.

Dated, April 26th, 1941.

Harry E. Schirick, Justice of the Supreme Court.

[fol. 261] IN SUPREME COURT OF NEW YORK, COUNTY OF ALBANY

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS

SIRS:

Please Take Notice that the above named Louis H. Pink, [fol. 262] as Superintendent of Insurance of the State of New York, and John J. Bennett, Jr., as Attorney General of the State of New York, defendants-appellants in the above named actions, heretofore consolidated, hereby appeal to the Court of Appeals of the State of New York from the final order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the office of the Clerk of said Court on the 2nd day of September, 1941, and a certified copy whereof was entered in the office of the Clerk of the County of Albany on the 2nd day of September, 1941, from the judgment entered thereon in the office of the Clerk of the County of Albany on the same date, which reversed upon the law and facts a final judgment of the Supreme Court, Albany County, entered in the office of the Clerk of Albany County on the 5th day of April,

1941, and from each and every part of said first mentioned order and judgment.

Dated: Albany, New York, September —, 1941.

Yours, etc. John J. Bennett, Jr., Attorney-General, attorney for Defendants-Appellants, Office and Post Office Address, The Capitol, Albany, New York.

To: Wiswall, Walton, Wood & MacAffer, Esqs., Attorneys for Plaintiffs-Respondents, Office and Post Office Address, 90 State Street, Albany, New York. W. B. Clarke, Esq., Albany County Clerk, Albany, New York.

[fol. 263] In Supreme Court of New York, Appellate Division

Present: Hon. James P. Hill, Presiding Justice; Hon. John C. Crapser, Hon. F. Walter Bliss, Hon. Gilbert V. Schenck, Hon: Sydney F. Foster, Associate Justices.

Order of Reversal—Entered September 2, 1941

The above named plaintiffs-appellants and the above named defendants-appellants in each of the above entitled actions heretofore consolidated having each appealed to the Appellate Division of the Supreme Court, Third Department, from certain portions of the final judgment entered therein in the office of the Clerk of the County of Albany on the 5th day of April, 1941, and the said appeals having been argued by Franklin D. Trueblood of Counsel for the said plaintiffs-appellants, and by Henry Epstein, Solicitor General, of Counsel for the defendants-appellants, and an opinion for reversal of this court having been handed down on the 2nd day of July, 1941, reversing said final judgment on the law and facts on an opinion by Hon. Sidney F. Foster, Associate Justice, in which Hon. James P. Hill, Presiding Justice, Hon. John G. Crapser and Hon. Gilbert V. Schenck, Associate Justices, concurred, with Hon. F. Walter Bliss, Associate Justice, dissenting in an opinion, and drecting that judgment be entered in conformity with [fol. 264] such decision and opinion and that findings of fact and conclusions of law inconsistent therewith be reversed and disapproved, and that decision and findings may be settled on five days' notice before Mr. Justice Foster at Liberty, New York.

Now on Motion of Wiswall, Walton, Wood & MacAffer, attorneys for the said plaintiffs-appellants, it is hereby

Ordered that the final judgment entered in these consolidated actions in the office of the Clerk of the County of Albany on the 5th day of April, 1941 be and the same is hereby reversed on the law and facts, and that judgment be and the same is hereby directed to be entered in conformity herewith; and it is further

Ordered that the findings of fact requested by the defendants Nos. 16, 26 and 28 and the first sentence of the findings of fact requested by the defendants No. 27 and the conclusions of law requested by the defendants Nos. 3, 4, 8, 9, 11, 13, 14, 15, 16, 19 and those parts of the conclusion of law requested by the defendants No. 20 found to be valid and applicable, and each and every one of them be and the same are hereby reversed and disapproved.

It is further Ordered that all other findings of fact and conclusions of law found by the Trial Court pursuant to the requests by both plaintiffs and defendants are hereby approved and affirmed; and in addition this Court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. That the contracts of inter-insurance of the plaintiffs are not performed or made in the State of New York. In [fol. 265] consistent findings Nos. 22 and 23 at fol. 544 as refused below are reversed and found.

2. That the plaintiffs do not transact any business of insurance within the State of New York.

3. That there are no resident agents in the State of New York of the plaintiffs in each of the above entitled actions, nor is any representative of the plaintiff in each of the above entitled actions, resident or otherwise, empowered to receive an application, issue a policy, adjust or pay a loss within the confines of the State of New York.

4. That the acts of the plaintiffs' engineers are limited to only an explanation of the plan, not solicitation; and investigation of the risk, and the appraisal of any loss.

Conclusions of Law

1. That the plaintiffs in each of the above entitled actions are not engaged in the business of insurance in the State

of New York, and that contracts between them and others, entered into the State of Illinois, must be governed by the laws of that state;

2. That the State of New York has not the power to regulate the business of the plaintiffs in each of the above entitled actions, and that statutes which attempt to provide for such regulation are invalid and inapplicable as to the plaintiffs in each of the above entitled actions.

And it is further Ordered that judgment be entered adjudging and declaring

[fol. 266] 1. That those portions of the Insurance Law of 1939 of the State of New York alleged in both complaints in the above entitled actions, and each and every part thereof, are invalid, unconstitutional and inapplicable as against the plaintiffs and the Subscribers exchanging contracts of inter-insurance under the designations of Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers.

2. That the defendants, their successors in office, their employees, agents and attorneys be perpetually restrained and enjoined from enforcing, or attempting to enforce in any manner whatsoever those portions of the Insurance Law of 1939 of the State of New York alleged in the said complaints and each of them, against the plaintiffs and the Subscribers exchanging contracts of inter-insurance under the designations of Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers.

Dated at Liberty, N. Y., August 26, 1941.

Sydney F. Foster, Justice Supreme Court, Appellate Division, 3rd Department.

A true copy. John S. Herrick, Clerk. Ent. 9/2/41.

[fol. 267] In Supreme Court of New York, Albany County

Judgment of Reversal

The above named plaintiffs-appellants and the above named defendants-appellants in each of the above entitled actions heretofore consolidated having each appealed to the

Appellate Division of the Supreme Court, Third Department, from certain portions of the final judgment entered therein in the office of the Clerk of the County of Albany on the 5th day of April, 1941, and the said appeals having duly come on to be heard before the Appellate Division of the Supreme Court, Third Department, at a Term held at the County Court House in the City of Albany commencing on the 5th day of May, 1941, and the said appeals having been argued by Franklin D. Trueblood, of counsel for the said plaintiffs-appellants, and by Henry Epstein, Solicitor General, of counsel for the defendants-appellants, and an order of the said Appellate Division having been made and entered reversing said final judgment on the law and facts and directing that judgment be entered in conformity therewith, and that certain findings of fact and conclusions of law be reversed and disapproved, and making certain additional findings of fact and conclusions of law.

Now, on motion of Wiswall, Walton, Wood & MacAffer, attorneys for the said plaintiffs-appellants, it is hereby

Adjudged that the aforesaid final judgment entered in the office of the Clerk of the County of Albany on the 5th day of April, 1941, be, and the same hereby is reversed on the law and facts; and it is further

[fol. 268] Adjudged and Declared

1. That those portions of the Insurance Law of 1939 of the State of New York alleged in both complaints in the above entitled actions, and each and every part thereof, are invalid, unconstitutional and inapplicable as against the plaintiffs and Subscribers exchanging contracts of inter-insurance under the designations of Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers.

2. That the defendants, their successors in office, their employees, agents and attorneys be perpetually restrained and enjoined from enforcing, or attempting to enforce in any manner whatsoever those portions of the Insurance Law of 1939 of the State of New York alleged in the said complaints and each of them, against the plaintiffs and the Subscribers exchanging contracts of inter-insurance under the designations of Canners Exchange Subscribers at War-

ner Inter-Insurance Bureau and Warner Reciprocal Insurers.

Dated Sept. 2nd, 1941.

Enter

W. B. Clarke, Clerk.

[fol. 269] In Supreme Court of New York, Appellate Division—Third Department

Hoopeston Canning Co., a Corporation, E. Pritchard, Inc., a Corporation, Lansing B. Warner, Incorporated, a corporation, Harry M. Brown and James T. Smith, Plaintiffs-Appellants,

Hoopeston Canning Co., a Corporation, E. Pritchard, Inc., a Corporation, Lansing B. Warner, Incorporated, a corporation, Paul E. Emerson and Ben A. Morton, Plaintiffs-Appellants,

v.

Louis H. Pink, a Superintendent of Insurance of the State of New York, and John J. Bennett, Jr., as Attorney General of the State of New York, Defendants-Respondents

Argued May Term, 1941.

Decided —— Term, 1941.

Before Hon. James P. Hill, Presiding Justice. Hon. John C. Crapser, Hon. F. Walter Bliss, Hon. Gilbert V. Schenck, Hon. Sydney F. Foster, Associate Justices.

[fol. 270] Appeal by plaintiffs and defendants from a declaratory judgment entered in the office of the Clerk of Albany County on April 5, 1941.

Wiswall, Walton, Wood & MacAffer, Attorneys for Plaintiffs-Appellants, Office and P. O. Address, 90 State Street, Albany, N. Y. Zane, Trueblood & Johnson (Franklin D. Trueblood and Carl O. Olson, of counsel) Associate Attorneys, Office and P. O. Address, 1210 Harris Trust Building, Chicago, Illinois.

John J. Bennett, Jr., Attorney General (Henry Epstein, Solicitor-General, Vincent Kiebala, Assistant Attorney-General, of counsel) Attorney for the Defendants-Respondents, The Capitol, Albany, N. Y.

FOSTER, *J.*:

The plaintiffs in these actions, for themselves and in their representative capacity, challenge the constitutionality and application of certain portions of the Insurance Law of this state sought to be applied to their method of exchanging contracts of inter-insurance. (Insurance Law, Sections 130, 168, 410, 412, 413, 415, 417, 418, 421, 422). The actions were consolidated before trial and the court below has rendered a declaratory judgment in favor of the plaintiffs as to certain parts of the statute, and against them as to other provisions. Plaintiffs and defendants have appealed from those provisions of the judgment which are contrary to their respective contentions. The controlling issues may [fol. 271] be stated as follows: (1) Are plaintiffs engaged in doing any insurance business in the State of New York; and (2) if so, do the statutes in question provide a reasonable regulation of such business?

These cases involve two different groups, those engaged in the canning industry, who insure between themselves, and those engaged in the wholesale grocery business and allied lines, who do likewise. Both groups obtain insurance coverage against loss or damage by fire, and similar hazards by substantially the same methods, although one group operates through what is called the Canners Exchange and the other through the Warner Reciprocal Insurers. Lansing B. Warner, Inc., an Illinois corporation, acts as attorney in fact for both groups. The persons, firms and corporations insured are referred to as subscribers, and they exchange reciprocal contracts among themselves, as both *insured* and *insurers*, through the medium of the attorney in fact. All of the subscribers are *insurers* of all risks. Prospective subscribers are required to apply for coverage in writing, and to appoint Lansing B. Warner, Inc., as attorney in fact to act for them in the exchange of insurance. The office of this corporation is in the City of Chicago, and it has no office elsewhere. It maintains an underwriting department which employs trained insurance engineers to procure data with respect to prospective risks, and who consult with subscribers as to methods calculated to diminish hazards. The attorney in fact receives applications from prospective subscribers at its office in Chicago, and has the power to accept or reject an applicant, although it may have

the advice of the committee in that regard. It issues [fol. 272] policies there, and upon the receipt of a policy the subscriber sends to it a sum of money which is called a deposit. The amount of this is determined by the attorney in fact, who takes into consideration the risk, amount and character of insurance, but it usually conforms to the premium charged by a stock insurance company for a similar risk. This deposit is recorded in the separate account of each subscriber, and held to secure any liability arising out of the exchange of contracts. This liability consists of a subscriber's proportionate share of losses and expenses, determined in the case of the Canners' group in the ratio that the amount of insurance bears to the total insurance of all subscribers, and in the Warner group in the ratio that the subscriber's deposit bears to the total deposits. The attorney in fact is authorized to adjust, compromise and settle all claims for losses, and to give and receive notice, defend suits, and to appoint a statutory agent in any state or territory for the service of process. It receives as compensation for this service twenty per cent of the deposits, out of which it must pay all expenses of operation, except taxes and counsel fees. In the Warner group it receives as additional compensation one-fifth of the credit balance left after all losses and expenses are paid. A reserve fund is built up by allocating thereto in the case of each subscriber a portion of the unused deposit. The balance of the deposit is returned to the subscriber at the end of each year as a saving. The reserve fund, if not used, is returned to the subscriber after insurance is discontinued.

The power of attorney provides for the appointment of five advisors from among the subscribers, who meet peri- [fol. 273] odically at the office of the attorney in fact, but these advisors do not function as a body and do not have ultimate power in the control and management of the affairs of the subscribers. It also provides that all contracts of insurance are to be made in the office of the attorney in fact at Chicago. The proof indicates that where an applicant is accepted a contract of inter-insurance, which is in the form of a standard fire insurance policy adapted for reciprocal insurance, is delivered to the subscriber by placing it in the mails at the office of the attorney in fact in the City of Chicago. The proof also shows that most of

the contracts are delvered to those who have been subscribers for many years, and that the power of attorney from each is executed but once and continued in force until revoked. The cost of reciprocal insurance provided by this method is from thirty to fifty per cent lower than it would be if the subscribers purchased their insurance from standard companies engaged in the business of insurance. Two reasons are given for this economy. The subscribers, as inter-insurers, insure themselves at actual cost without the use of an expensive agency system which is commonly employed by stock companies. Also the loss ratio appears to be far lower than that of the ordinary stock companies, and this is said to be due to the care with which subscribers are accepted.

It is clearly apparent from the foregoing that the agreements or policies issued by the attorney in fact are contracts of insurance (People v. Roschli, 275 N. Y. 26; Thomas Canning Co. v. Canners Exchange Subscribers at Warner Insurance Bureau, 219 Mich. 214). It follows that plain-[fol. 274] tiffs are engaged in the insurance business. The question is whether they are engaged in this business in the State of New York.

Both the Canners Exchange and the Warner Reciprocal Insurers applied to the Superintendent of Insurance of the State of New York in 1930 for a license to transact business in this state as inter-insurers, and their licenses have been renewed from time to time. However the mere issuance of a license raises no presumption that the licensee is doing busines within the state, or that the latter has power to regulate (People ex rel. Sea Ins. Co. v. Graves, 274 N. Y. 312).

Aside from exhibits, the evidence at the trial as to this issue was limited to the testimony of a single witness, the vice-president of the attorney in fact. From his testimony these facts appear. New subscribers usually apply through the recommendation of one already insured. An investigator or engineer, who travels out of the Chicago office, calls upon the prospective subscriber and investigates the risk. He does not solicit but he may explain the plan. His opinion is sought by the attorney in fact as to whether or not a prospective subscriber is eligible. The report of the investigator is made to the Chicago office. Data concerning the credit standing of the prospect and moral qualifications

is secured from banks and subscribers in this state. The investigator or insurance engineer may give the prospect a blank form of application and power of attorney, at least there is no rule against such a practice. This application and power of attorney, however delivered, may be, and frequently is, executed where the applicant resides and [fol. 275] where the risk is located. After a policy is executed the insurance engineers service the risk by advise as to how the same may be minimized. If there is a substantial loss an appraisal of the loss is made at the site of the property, and the loss is then paid on the basis of such appraisal, but at the Chicago office.

Coupled with the acts indicated in this recital, which may and do take place in this state, there is evidence that the transactions involved are not isolated and sporadic, but show a substantial and continuous course of business. Thus the net deposits of the Canners Exchange upon risks in this state rose from $105,786.86 in the year 1931 to the sum of $298,284.57 in the year 1938; and during the same period the deposits of the Warner Reciprocal Insurers rose from $28,529.88 to $95,162.82. Losses paid by the Canners Exchange for the same period upon such risks exceeded $600,000.00, and for the Warner group the figure was more than $110,000.00.

Do these facts support the conclusion that plaintiffs are engaged in the business of insurance in this state, as contrasted to the mere insurance of risks located within the state. We think the answer must be in the negative. Applications are received, policies are issued and losses are paid in the State of Illinois. There are no resident agents in the State of New York, nor is any representative of the plaintiffs, resident or otherwise, empowered to receive an application, issue a policy, adjust or pay a loss within the confines of this state. Doing business, according to the commonly accepted meaning of the term, must embrace the power to solicit or the power to bind, or both. These [fol. 276] elements are lacking in this case, for plaintiffs project no such authority within the limits of this state. The acts of plaintiffs' agents are limited to only an explanation of the plan, not solicitation; an investigation of the risk, and the appraisal of any loss. These acts are wholly consistent with the right of a resident to secure a foreign contract of insurance, a right which is supported by an impressive array of authorities (Allgeyer v. Louisi-

ana, 165 U. S. 578; St. Louis Compress Co. v. Arkansas, 260 U. S. 346; Aetna Life Ins. Co. v. Dunken, 266 U. S. 389; Minnesota Association v. Benn, 261 U. S. 140; People ex rel. Kirkman v. Van Amringe, 266 N. Y. 277; U. S. Mortgage and Trust Co. v. Ruggles, 258 N. Y. 32; Stone v. Penn Yan K. P. & B. Railway, 197 N. Y. 279). If this right may be abridged merely because of the inspection of risks and appraisal of losses here, then it is a right in theory only and of no practical value. The cases cited, however, emphasize the fact that situs does not confer upon the state the power to regulate. The necessary corollary to this doctrine is that inspections and appraisals, which have to do with the situs, do not confer such jurisdiction. This doctrine of course does not apply where a foreign corporation has an agent within this state authorized to represent it for the purpose of doing business. It is then doing business here through its alter ego, a situation which does not exist in this case. On the basis of these considerations we reach the conclusion that plaintiffs are not engaged in the business of insurance in this state, and that contracts between them and others, entered into in the State of Illinois, must be governed by the laws of that state (People ex rel. [fol. 277] Sea Insurance Co. v. Graves, supra; Huntington v. Sheehan, 206 N. Y. 486; Knights Templars & Masons Life Indemnity Co. v. Jarman, 187 U. S. 197). It follows, that under the circumstances disclosed, the State of New York has not the power to regulate the business of plaintiffs, and that statutes which attempt to provide for such regulation are invalid and inapplicable as to them. This conclusion renders it unnecessary to discuss any other issue.

The judgment should be reversed with costs and a judgment entered in conformity herewith.

Dissenting Opinion by Bliss, J.

Bliss, J. (dissenting):

I dissent from the opinion for reversal and vote to affirm the judgment below. I do this principally upon the authority of International Harvester Company vs. Ky., 234 U. S. 579. As in that case, we have here a continuous course of a large volume of business and business conduct by the appellants over a considerable period of time in the State of New York. We have agents interviewing prospects,

explaining the plan, inspecting the property, recommending changes to reduce the risk and even carrying application blanks. These agents obtained the execution of these applications. The payment of the premiums or "deposits" as they are called, is made within the State of New York. The agents of the insurer are within the state, not occasionally but with uninterrupted continuity soliciting and [fol. 278] obtaining contracts, servicing the risks and adjusting the losses. The agents then keep in constant touch with the subscribers and give the usual fire insurance service. Also the usual insurance methods are followed as to losses. They are investigated and adjusted here, although payment comes from Chicago, and if no satisfactory adjustment is made suit may be brought in New York. The volume of business thus transacted in New York has been large and has down through the years covered something over 50,000 risks. This all indicates a continuous and steady course of business conduct rather than isolated transactions. We must look to the substance of this insurance business and not merely to its outward form. While there has been a well prepared attempt to avoid the semblance of doing business within our state, when the nature of the business itself is analyzed it cannot be distinguished from that of any other foreign fire insurance doing business here.

I therefore vote to affirm the judgment below.

Stipulation Waiving Certification

It is Hereby Stipulated and Agreed by and between the attorneys for the respective parties to the above entitled proceeding that the foregoing are true and correct copies of all papers constituting the record in the Appellate Division, Third Department, the order of the Appellate Division herein and the judgment entered upon said order, all opinions of the Appellate Division and notice of appeal to the Court of Appeals now on file with the Clerk of the [fol. 279] County of Albany and certification thereof is hereby waived.

Dated November 3, 1941.

John J. Bennett, Jr., Attorney-General; Milton Kaplan, Assistant Attorney-General, Attorney for Defendants-Appellants. Wiswall, Walton, Wood & MacAffer, Attorneys for Plaintiffs-Respondents.

[fol. 279a] In Court of Appeals of New York

Hoopeston Canning Co., Inc., et al., Respondents,

v.

Louis H. Pink, as Superintendent of Insurance of the State of New York, et al., Appellants

(Decided June 4, 1942)

Appeal from a judgment entered September 2, 1941, upon an order of the Appellate Division of the Supreme Court in the third judicial department which (1) reversed, on the law and the facts, a declaratory judgment entered upon a decision of the court at a Trial Term (Schirick, J.) and (2) directed the entry of judgment, upon additional findings, in conformity with its opinion. (See 262 App. Div. 446.)

John J. Bennett, Jr., Attorney-General (Henry Epstein, Vincent Kiebala and Milton Kaplan of counsel), for appellants.

Franklin D. Trueblood and Carl O. Olson for respondents.

Opinion—June 4, 1942

Conway, J.:

This is an action seeking a declaratory judgment that certain sections, or portions thereof, of the Insurance Law [fol. 279a-1] (Cons. Laws, ch. 28), as amended in 1939, relating to the regulation of foreign reciprocal insurers authorized to transact the business of insurance within New York State, are illegal and invalid in so far as they purport to affect two licensed foreign reciprocal insurers or inter-insurers. The two groups are known as the Canners Exchange Subscribers at Warner Inter-Insurance Bureau, hereinafter called Canners, and Warner Reciprocal Insurers, hereinafter called Warner.

In 1930 Canners was authorized to transact within this State the business of fire, lightning, hail, windstorm, use and occupancy and sprinkler leakage insurance, pursuant to the then existing provisions of section 305 of the Insurance Law. It has continued to be so authorized to date. There are approximately 976 persons, firms and corporations engaged in the canning industry who are subscribers

and approximately ninety-three of them are located in New York State. This action was brought by plaintiffs in a representative capacity on behalf of all the subscribers in Canners. Under the plan each subscriber insures all other insurers and in turn is insured by them. There is an exchange of indemnity among the subscribers evidenced by insurance policies. The exchange of so many policies with the necessity of affixing signatures thereto would be impracticable. Each of the subscribers, therefore, appoints an attorney-in-fact by executing a power of attorney. The attorney-in-fact is Lansing B. Warner, Inc., which has its only office in Chicago, Ill. The appointment authorizes the attorney-in-fact to execute the reciprocal insurance policies, to exchange the contracts of inter-insurance, to receive deposits, to give and receive notices and adjust claims, to bring, defend, compromise or adjust suits at law or in equity and to appoint an agent or representative in any State upon whom process may be served and to perform such other acts as may be necessary. It is a continuing power of attorney and under it subsequent reciprocal insurance contracts are executed. The consideration for the contracts of reciprocal insurance is the exchange of indemnity among subscribers. The obligation of the subscriber is several, separate and individual. To secure his liability in the exchange of contracts, the subscriber agrees to deposit [fol. 279a-2] with the attorney-in-fact a sum of money to be designated "Expense and Guarantee Fund," together with a further sum of ten dollars to be designated "Reserve Fund", which may be increased to an average amount of two dollars for each $1,000 of insurance carried by the subscriber. The liability of the subscriber is only such proportionate share of the insurance granted under his policy as the reserve fund deposit of the subscriber bears to the aggregate reserve fund deposits of all subscribers. The power of attorney further provides for the creation of an advisory committee of five members prominent in the canning industry. Their duties are supervisory and they have custody of the funds deposited and are consulted before any new subscriber is admitted. The compensation of the attorney-in-fact is twenty per cent of the expense and guarantee fund due from each subscriber. In return the attorney-in-fact agrees to pay all expenses except certain enumerated ones.

Ordinarily, a canner in this State who wishes to become a subscriber writes to Lansing B. Warner, Inc., at its office in Chicago, Ill., inquiring about the plan. Usually this is done after one of the subscribers in this State has recommended the plan to him. Sometimes the subscriber himself writes asking the attorney-in-fact to explain the plan to a prospective applicant. Thereupon an inspector or engineer of Canners from Chicago calls upon the prospective applicant at his place of business in New York to explain the plan and its operation and for the purpose of investigating his properties and determining whether in that respect he is eligible to be a subscriber. At the same time the attorney-in-fact also consults with subscribers to determine the standing of the applicant in his community, his reputation for honesty, his "general housekeeping ability and carefulness" and his credit, a report upon which is also obtained from the prospective subscriber's bank. The engineer reports back to the Chicago office and makes a recommendation as to whether an application blank should or should not be sent to the prospective applicant. The attorney-in-fact makes the decision. The application blank when forwarded is accompanied by a power of attorney both of which are to be signed by the prospective applicant [fol. 279a-3] and returned by mail to Chicago, together with a deposit in the amount requested. The amount of the deposit is determined by the attorney-in-fact and is based on the amount of indemnity desired and the physical characteristics and hazards of the subscriber's property. After the acceptance of the application, the engineers of the exchange "service the risk" so as to minimize the risk of loss. A fire insurance policy written on a standard form, approved by the Superintendent of Insurance of this State, is signed by the attorney-in-fact and mailed from Chicago to the Subscriber.

The exchange employs twenty-five or twenty-six trained insurance engineers specializing in fire insurance hazards. They inspect physical properties, investigate the moral hazard of a prospective subscriber and explain the plan of reciprocal insurance to him. These men travel out from Chicago and consult with subscribers as to methods for reducing fire hazards on properties insured, such as by building fire walls, putting in wire glass windows and by other methods familiar to insurance engineers. In the event of a large loss an inspector or engineer is sent from Chicago

to examine the property affected and to report back. Upon the basis of his findings the loss is paid from Chicago by the attorney-in-fact. The inspector or engineer has authority to investigate the cause of the fire so that steps may be taken to prevent a similar future loss.

Prior to 1936 no taxes were paid to the State of New York. In 1935, the Insurance Law, section 84, was amended so as to provide for the payment of a premium tax for the privilege of doing business in this State. The Superintendent of Insurance of the State determined that the statute, as amended, was applicable to inter-insurers. A report on premium income so taxable was filed for the year 1935 and taxes for that year were paid under protest. Reports for succeeding years have been filed and taxes paid without protest. The total of the taxes paid by Canners and Warner for the years 1935 to 1938 is $16,026.39.

The annual statements filed with the Superintendent of Insurance of the State by Canners for the years 1931-1938, inclusive, show that, except for the years 1932 and 1933, the gross risks written in this State have increased progres- [fol. 279a-4] sively from approximately $23,000,000 to $81,000,000; the net risks from approximately $8,000,000 to $32,000,000.

The second group consists of wholesale grocers who are reciprocal insurers under the name of Warner Reciprocal Insurers and they operate under substantially the same plan as do the subscribers of Canners. The principals in this group, however, execute a document known as "Appointment of Agent" instead of a power of attorney. The same corporation which is attorney-in-fact for the subscribers of Canners is agent for the principals of Warner. The appointment of agent provides that the principals shall deposit with the agent at Chicago a sum designated "Guaranty Deposit," the amount of which is to be determined by the agent in accordance with the risk, amount and term of insurance. The liability of the principal is "several, separate and not joint." Provision is made for "Advisors," similar to those on the advisory committee of Canners and for compensation of the agent. The risks are serviced by the underwriting and engineering department of the agent.

The plaintiffs represent approximately 2,100 persons, firms and corporations constituting the principals in Warner of whom approximately 230 are located in this State.

The gross risks of Warner in this State were approximately $7,000,000 in 1931 and $38,000,000 in 1938.

Plaintiffs allege that although Insurance Law, section 414, subdivision 2 (Cons. Laws, ch. 28), allows to every authorized foreign reciprocal insurer one year after the effective date of the chapter, January 1, 1940, to revise its subscribers' agreement and its articles of association, if any, so as to conform to the regulations applicable to reciprocal insurers thereafter to be organized under Insurance Law, article 42, that many provisions of the chapter including portions of sections 130, 168, subdivision 2, 410, subdivision 1, 412, subdivision 1, 413, subdivision 2, 415, subdivision 1, 417, subdivision 1, 418, subdivision 3, 420, 421, 422, subdivision 1, and 422, subdivision 2, will become *prima facie* applicable to the two insurers and their subscribers and principals and will "dislocate" their present plan of insurance so as to cause irreparable injury. Therefore, they pray that those sections or subdivisions of sec- [fol. 279a-5] tions be declared invalid, unconstitutional and void as against the plaintiffs and the subscribers and principals of the respective insurers.

Special Term found facts from which it concluded that Canners and Warner were doing business in this State. The Appellate Division reversed three and a portion of a fourth finding of fact. The three findings reversed are the following:

"16. All the subscribers in both groups are associated in the common aim or purpose of receiving and giving indemnity in case of loss. The liability of each Subscriber is to pay his part of the losses and expenses in the ratio that his deposit bears to all the deposits."

"26. The insurance engineers carry blank forms of appointment of agent and power of attorney. These are furnished to prospective subscribers by the insurance engineers upon request. The power of attorney or appointment of agent is fully executed, in the State of New York. It is complete when the prospective subscriber affixes his signature in this state, oftentimes in the presence of the insurance engineer."

"28. In case of loss, particularly a large one, the insurance engineers investigate the cause of the loss and the extent thereof. The investigation with respect of the loss is made in the State of New York."

There was a reversal of the following sentence in finding 27:

"The premiums or deposits are paid with checks drawn on New York State banks."

The weight of the evidence was clearly with Special Term as to findings 16 and 28. As to finding 27, it is unimportant whether the premiums or deposits were paid by checks drawn on New York State banks. As to finding 26, the weight of the evidence as to the findings in the first two sentences is with the Appellate Division but the findings are unimportant. As to the remaining two sentences, they constitute mixed findings of fact and conclusions of law. In [fol. 279a-6] so far as it was found that the power of attorney or appointment of agent was signed in this State by the prospective subscriber and principals, the weight of the evidence is with Special Term.

Taking the unreversed findings of Special Term and those which were reversed but which are supported by the weight of the evidence, the conclusion of law of Special Term numbered 3 that "The plaintiffs are doing the business of insurance in the State of New York" follows of necessity. Each subscriber and each principal is an insurer and initiates within this State his contract of inter-insurance. This is not a situation where the applicant for insurance to be issued to him solely as an *insured* mails an application for that insurance to a foreign company in a foreign State. In this instance the insurer, resident here, signs a power of attorney or appointment of agent within this State and confers thereby power upon the attorney or agent to execute for him a policy of insurance so that he, our resident, may become the insurers reciprocally of hundreds of risks throughout this country and in Canada. Our resident is an insurer and it matters not where his attorney or agent executes the contract of insurance by which he is bound. Thus Insurance Law, section 41, subdivision 3, now provides: "The term 'doing an insurance business,' within the meaning of this chapter, shall be deemed to include (a) the making, as insurer, or *proposing to make as insurer*, of any insurance contract * * *." The two reciprocal insurers are but the aggregations of the subscribers and principals. (Ins. Law, § 410.)

There is another reason why plaintiffs may not have the declaratory judgment they seek.

The contention of the plaintiffs in this: That the two insurers have been authorized by the Superintendent of Insurance of the State to transact insurance business here but, despite such authorization, are not transacting any business in this State; that although so *authorized* and *licensed*, since they are not transacting business here, they are not subject to our statutory regulation of *authorized* reciprocals but must be treated as though foreign *unauthorized* reciprocal insurers; that as such foreign reciprocal [fol. 279a-7] insurers not doing business here, New York State may not regulate their insurance contracts or conduct here because such attempted regulation would run counter to the rule announced in *Allgeyer* v. *Louisiana* (165 U. S. 578) and subsequent authorities holding similarly.

Plaintiffs concede that the two insurers sought authorization to transact business within this State for two reasons: *First*, each subscriber and principal within this State is enabled to serve process upon the Superintendent of Insurance and thus sue the two insurers in our courts upon losses suffered here, and *second*, the licenses enable the insurers to file with and to have audited by the New York Superintendent, annual statements which are available for examination by resident subscribers and principals. In addition subscribers and principals know that the minimum capital and the assets of the insurers, since they have been licensed here, must be substantially the same as those of domestic insurers. (Ins. Law, §§ 42, 90.) These considerations are helpful competitively in obtaining insurance business. That much the two insurers desire. The position they seek to maintain, however, is that since, although authorized, they transact no business here, they may not be held subject to our statutes applicable to authorized reciprocal insurers in other respects but must be treated as though unauthorized.

We must bear in mind in considering the contention of Canners and Warner that the Legislature imposed only the same conditions upon them as foreign insurers as were imposed upon domestic insurers, in so far as obtaining a license to do business within this State is concerned. We make no distinction. Thus Insurance Law, section 414, subdivision 2, reads as follows: "Every such *existing reciprocal insurer and every authorized foreign reciprocal insurer*, shall, within one year after the effective date of this chapter, have so revised its subscribers agreement and

its articles of association, if any, as to conform to the requirements applicable to reciprocal insurers hereafter to be organized under the provisions of this article." Domestic reciprocal insurers are organized under section 411 of the article. Insurance Law, section 422, is entitled *Foreign or alien reciprocal insurers* and provides for the licens-[fol. 279a-8] ing of a reciprocal insurer of another State or of the Dominion of Canada. The section, subdivision 1, then provides: "* * *. Such foreign or alien reciprocal insurer shall comply with substantially the same requirements of this chapter which are applicable to domestic reciprocal insurers hereafter to be organized and authorized to do the same kind or kinds of insurance business * * *."

Requirements such as these are not attempts to control the operations of foreign insurers outside the State of New York and thus to exercise extraterritorial power. (*Firemen's Ins. Co.* v. *Beha*, 30 Fed. Rep. (2d) 539; affd., 278 U. S. 580.) There the court said (at p. 542):

"The second constitutional ground is that the statute, if it requires, as a condition upon the grant of the plaintiff's license, that it conform its investments in New Jersey to the provisions of the New York law respecting domestic corporations, attempts to control its operations outside New York, and thus to exercise an extraterritorial power. If so, then any other New York statute which subjected foreign insurance companies to the same regulations as domestic in respect of their solvency would be unconstitutional, unless it could be complied with by conduct taking place only in New York, which it seldom could. For example, a state might not prescribe the necessary proportion between the assets and liabilities of a foreign insurance company; or the amount of its cash capital, as a condition to its doing business within its borders. * * *

"Perhaps the power may be limited by the purpose and the fitness of the measure to accomplish it; but, whether that be true or not, when so limited it is not further circumscribed by the indirect effects of its operation. As we have said, scarcely any condition can be imposed touching the financial stability of a foreign corporation, which will not involve some results elsewhere; it is enough that these be ancillary to the accomplishment of genuinely local purposes connected with the company's prospective business. Otherwise each state could set the standard of security for

the rest of the Union, an intolerable limitation upon the autonomy of each community."

Let us now consider the sections of which complaint is [fol. 279a-9] made by the plaintiffs. Section 412, subdivision 1, provides that no *authorized* reciprocal insurer shall make any new agreement for insurance with any person, firm or private corporation who or which does not have assets in an amount not less than $10,000 in excess of liabilities. This applies to domestic and foreign reciprocals. Our Legislature has determined that this provision is advisable for the protection of our residents. If Canners or Warner is not *authorized* or *licensed* here, and transacts no insurance business here, the statute is not applicable. Neither insurer need be authorized in this State but if it is, it is clear that it must comply with the statute. Section 415, subdivision 1, provides that every subscriber of an *authorized* reciprocal insurer "shall have executed a subscriber's agreement," and every subscriber shall execute and duly acknowledge the same in a manner sufficient for the acknowledgment of conveyances of real property to be recorded in the State of the subscriber's domicile and that each agreement shall contain certain designated provisions. This applies to domestic and foreign reciprocals. Since the two insurers are licensed, this section is applicable. So it is as to sections 168, subdivision 2, 410, 413, subdivision 2, 417, subdivision 1, 418, subdivisions 1 and 3, 420, 421 and 422, subdivision 2.

As to section 130 a different problem is presented. That section provides, in substance, that "no licensed foreign" insurer shall in this State issue, deliver or otherwise effectuate any contract of insurance covering certain persons, properties or risks "unless such contract of insurance is issued or effectuated through, or countersigned by, a resident licensed insurance agent of this state." Canners and Warner contend that they have never issued, delivered or otherwise effectuated a contract of insurance in this State. If that were so, section 130 would be inapplicable to them. It is, however, applicable because, as indicated above, they are doing business here.

The judgments should be reversed and the complaint dismissed, with costs in all courts.

Lehman, Ch. J., Loughran, Fuld, Rippey, Lewis and Desmond, JJ., concur.

Judgments reversed, etc.

[fol. 279b] IN COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, SS:

Pleas in the Court of Appeals held at Court of Appeals Hall, in the City of Albany, on the 4th day of June in the year of our Lord on- thousand nine hundred and forty-two, before the Judges of said Court.

Witness, The Hon. Irving Lehman, Chief Judge, Presiding. John Ludden, Clerk.

REMITTITUR—June 5, 1942.

HOOPESTON CANNING CO., &c., & ORS., Respondents,

vs.

LOUIS H. PINK, as Superintendent of Insurance, &c., & ano., Appellants

HOOPESTON CANNING CO., &c., & ORS., Respondents,

vs.

SAME, Appellants

Be It Remembered, That on the 3rd day of November, in the year of our Lord one thousand nine hundred and forty-one, Louis H. Pink, as Superintendent of Insurance, &c., and another, the appellants in this cause, came here unto the Court of Appeals by John J. Bennett, Jr., Attorney-General, and filed in the said Court a Notice of Appeal and return thereto from the order and judgment of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Hoopeston Canning Co., &c., and others, the respondents in said cause, afterwards appeared in said Court of Appeals by Wiswall, Walton, Wood & MacAffer, their attorneys.

Which said Notice of Appeal, and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Henry Epstein of counsel for the [fol. 279b-1] appellants, and by Mr. Franklin D. Trueblood (Chicago, Ill.) of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the

judgments herein be and the same hereby are reversed and the complaint dismissed with costs in all courts.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgments be reversed and the complaint dismissed with costs in all courts, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE

Albany, June 5, 1942.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ John Ludden, Clerk. (Seal State of New York, Court of Appeal.)

[fol. 280] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

Present: Hon. Riley H. Heath, Justice.

HOOPESTON CANNING CO., a Corporation, E. PRITCHARD, INC., a Corporation, Lansing B. Warner, Incorporated, a Corporation, Harry M. Brown and James T. Smith, Plaintiffs,

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and John J. Bennett, Jr., as Attorney-General of the State of New York, Defendants

HOOPESTON CANNING CO., a Corporation, E. PRITCHARD, INC., a Corporation, Lansing B. Warner, Incorporated, a Corporation, Paul E. Emerson and Ben A. Morton, Plaintiffs,

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and John J. Bennett, Jr., as Attorney-General of the State of New York, Defendants

ORDER ON REMITTITUR—June 23, 1942

The above named defendants having appealed to the Court of Appeals of the State of New York from the judgment of reversal of this Court entered upon the order of the Appellate Division of the Supreme Court, Third Department, in the office of the Clerk of the County of Albany, [fol. 281] on the 2nd day of September, 1941, reversing a judgment for defendants heretofore entered herein in the office of the said Clerk on the 5th day of April, 1941, and from each and every part of said judgment of reversal and order of reversal as well as from the whole thereof; and the said appeal having been duly argued at the said Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the said judgment so appealed from as aforesaid be reversed and the complaint dismissed with costs in all Courts, and having ordered and adjudged that the proceedings therein be remitted to this Supreme Court there to be proceeded upon according to law;

Now, on reading and filing the remittitur from the said Court of Appeals herein, and upon motion of John J. Bennett, Jr., Attorney-General, attorney for the defendants herein, it is hereby

Ordered that the order and judgment of the said Court of Appeals be and the same hereby are made the order and judgment of this Court.

Enter.

Riley H. Heath, J. S. C.

[fol. 282] In Supreme Court of New York, County of Albany

Hoopeston Canning Co., a Corporation, E. Pritchard, Inc., a Corporation, Lansing B. Warner, Incorporated, a Corporation, Harry M. Brown and James T. Smith, Plaintiffs,

against

Louis H. Pink, as Superintendent of Insurance of the State of New York, and John J. Bennett, Jr., as Attorney-General of the State of New York, Defendants

Hoopeston Canning Co., a Corporation, E. Pritchard, Inc., a Corporation, Lansing B. Warner, Incorporated, a Corporation, Paul E. Emerson and Ben A. Morton, Plaintiffs,

against

Louis H. Pink, as Superintendent of Insurance of the State of New York, and John J. Bennett, Jr., as Attorney-General of the State of New York, Defendants

Judgment on Remittitur—June 23, 1942

The above named defendants having appealed to the Court of Appeals of the State of New York from the judgment of reversal of this Court entered upon the order of the Appellate Division of the Supreme Court, Third Department, in the office of the Clerk of the County of Albany, on the 2nd day of September, 1941, reversing a judgment for defendants heretofore entered herein in the office of the said Clerk on the 5th day of April, 1941, and from each and

[fol. 283] every part of said judgment of reversal and order of reversal as well as from the whole thereof; and the said appeal having been duly argued at the said Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the said judgment so appealed from as aforesaid be reversed and the complaint dismissed with costs in all Courts, and having ordered and adjudged that the proceedings therein be remitted to this Supreme Court there to be proceeded upon according to law; and the remittitur from the said Court of Appeals having been filed herein, and the order having been entered herein making the order and judgment of the said Court of Appeals the order and judgment of this Court;

Now on motion of John J. Bennett, Jr., Attorney-General, attorney for the defendants herein, it is hereby

Ordered and Adjudged that the order and judgment of said Court of Appeals be and the same hereby are made the order and judgment of this Court; and it is further

Ordered and Adjudged that the said judgment entered herein on the 2nd day of September, 1941, be and the same hereby is reversed and the complaint dismissed; and it is hereby

Ordered and Adjudged that the defendants recover of the plaintiffs the sum of $585.08 costs as taxed, and that the defendants have execution therefor.

Judgment signed and entered this 23rd day of June, 1942.

W. B. Clarke, Clerk.

[fol. 284] In Supreme Court of the United States

[Title omitted]

Petition for Appeal to the Supreme Court of the United States—Filed August 6, 1942.

To the Honorable Robert H. Jackson, Associate Justice of the Supreme Court of the United States:

Your petitioners, Hoopeston Canning Co., a corporation, E. Pritchard, Inc., a corporation, Lansing B. Warner, Incorporated, a corporation, Harry M. Brown, James T. Smith, Paul E. Emerson, and Ben A. Morton, respectfully show:

1. The petitioners brought two actions for a declaratory judgment and injunction in the Supreme Court of the State

[fol. 285] of New York, Albany County, under Section 473 of the New York Civil Practice Act, on November 1, 1939, against the respondents, Louis H. Pink, as Superintendent of Insurance of the State of New York, and John J. Bennett, Jr., as Attorney-General of the said state, alleging that they each sued on behalf of a group of persons, firms, and corporations, known as Subscribers, exchanging in Illinois contracts of inter-insurance against loss or damage by fire pursuant to the laws of that state, one of said groups being composed of Subscribers engaged in the canning business, and the other of Subscribers engaged in the wholesale grocery business and allied lines; that prior to the commencement of these suits the State of New York enacted certain statutes, to-wit, Section 130; Section 168, subsection 2; Section 410, subsection 1; Section 412, subsection 1; Section 413, subsection 2; Section 415, subsection 1; Section 415, subsections 1(d) and 1(e); Section 417, subsection 1; Section 418, subsections 1 and 3; Section 420; Section 421; and Section 422, subsection 1, of the Insurance Law of 1939 of the State of New York (Chapter 882, found at pages 2530 et seq in Volume 2, of the Laws of 1939 of the State of New York, being Chapter 28 of the Consolidated Laws of said state), which statutes and portions thereof alleged in the complaints, as against petitioners, are invalid as violative of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. The respondents answered the complaints, and the actions having been consolidated, came on for trial at the [fol. 286] Albany Trial Term before Mr. Justice Schirick. The petitioners introduced evidence tending to establish the issues of invalidity. At the conclusion of the trial the cause was submitted upon the written briefs of the parties in which the questions arising under the Constitution of the United States were elaborately argued. On December 10, 1940, the Court handed down its decision, a true copy thereof marked "Exhibit A" being attached to the Juris-

dictional Statement presented herewith and made a part thereof, declaring the aforesaid Section 412, subsection 1, prohibiting a person from participating in this insurance who does not have a net worth of more than ten thousand dollars, to be a discrimination against the many small business men among petitioners who cannot qualify, and declaring the aforesaid Section 418, subsection 1, requiring petitioners to build up and maintain reserves in excess of the reserves required of insurance companies, likewise to be a discrimination against petitioners. The decision also declared certain other of the statutes to be invalid on the ground of unreasonable regulation under the due process clause, but denied petitioners' contention that said statutes were invalid for lack of jurisdiction under the due process clause. Requests to find having been submitted by the parties, a final judgment giving effect to the decision was entered on April 5, 1941. A true copy of said final judgment marked "Exhibit 1" is attached hereto and made a part hereof.

3. Within the time prescribed by Section 612 of the New York Civil Practice Act both sides appealed from the final judgment of the Trial Term to the Appellate Division of the Supreme Court of the State of New York, Third Department. In their Notice of Appeal, a true copy thereof marked "Exhibit 2" being hereto attached and made a [fol. 287] part hereof, the petitioners specifically stated that they appealed from that part of the judgment of the Trial Term which held the statutes enumerated therein to be valid and constitutional. The appeal having been perfected, the federal constitutional questions were argued in the Appellate Division both orally and in the briefs. On July 2, 1941, the Appellate Division filed its decision, a true copy thereof marked "Exhibit D" being attached to said Jurisdictional Statement and made a part thereof, reversing the judgment of the Trial Term as to jurisdiction under the due process clause and declaring the statutes in question to be invalid and inapplicable to petitioners. A final order of reversal was duly filed and a judgment based thereon was entered in the Supreme Court, Albany County on September 2, 1941. True copies of said final order of reversal and judgment, marked "Exhibit 3" and "Ex-

hibit 4" respectively, are hereto attached and made a part hereof.

4. Within the time prescribed by Section 592 of the New York Civil Practice Act the respondents filed a Notice of Appeal, a true copy thereof marked "Exhibit 5" being hereto attached and made a part hereof, from each and every part of the aforesaid final order of reversal and judgment entered thereon. The appeal was perfected and the federal constitutional questions were again argued orally and in the briefs. On June 4, 1942, the Court of Appeals filed its decision, a copy marked "Exhibit H" being attached to the Jurisdictional Statement and made a part thereof, reversing the final order of reversal of the Appellate Division and the judgment entered thereon, and declaring the statutes in question to be valid and applicable under the Constitution of the United States. By an order and judgment dated June 5, 1942, a true copy thereof [fol. 288] marked "Exhibit 6" being hereto attached and made a part hereof, the Court of Appeals reversed the aforesaid order of reversal of the Appellate Division and judgment based thereon and remitted the records and proceedings in the case to the Supreme Court, State of New York. Thereupon, on June 23, 1942, the Supreme Court, Albany County, ordered that the aforesaid order and judgment of the Court of Appeals be made the order and judgment of said Supreme Court. A true copy of said order of the Supreme Court is annexed hereto marked "Exhibit 7" and made a part hereof. And on the same day, to-wit, June 23, 1942, a final judgment dismissing the complaints and for costs was duly entered by the Supreme Court, Albany County, a true copy thereof marked "Exhibit 8" being hereto attached and made a part hereof.

5. Your petitioners have therefore exhausted their remedies in the courts of the State of New York, having duly defended the appeal of respondents from the aforesaid final order and judgment of the Appellate Division to the Court of Appeals of the State of New York, which is the highest court in the State of New York in which a decision in this cause could be had. The aforesaid appeal to the Court of Appeals of the State of New York directly presented to that Court the federal questions herein sought

to be reviewed by the Supreme Court of the United States, which questions are detailed in the Assignment of Errors presented herewith. The Court of Appeals reversed the aforesaid final order of reversal of the Appellate Division and judgment entered thereon, and ordered the complaints dismissed, and your petitioners therefore having no further remedy left in the courts of the State of New York are entitled to appeal to the Supreme Court of the United States, inasmuch as the courts of the State of New York [fol. 289] have decided the federal questions involved in this proceeding against the contentions of your petitioners and in favor of the validity of the New York statutes in question under the Constitution of the United States.

6. By reason of the foregoing, the aforesaid final order and judgment of the Court of Appeals of the State of New York dated June 5, 1942, and entered on June 23, 1942, is the order of the highest court of the State of New York in which a decision in this cause could be had; and the Supreme Court of the State of New York, Albany County, has possession of the record of the proceedings in this cause.

7. In accordance with Section 237 (a) of the Judicial Code of the United States, as amended (28 U. S. C. A. § 344 (a)) and Section 1 of the Act of Congress of January 31, 1928 (c. 14, 45 Stat. 54) as amended by the Act of Congress of April 26, 1928 (c. 440, 45 Stat. 466) and in accordance with the Revised Rules of the Supreme Court of the United States, your petitioners respectfully show that this cause is one in which a review can be had in the Supreme Court of the United States as a matter of right in that a final judgment has been rendered in the highest court of the State of New York in which a decision in the cause could be had, and that the validity of statutes of the State of New York was drawn in question on the ground of their being repugnant to the Constitution of the United States and the decision was in favor of their validity.

8. The errors upon which your petitioners are entitled to an appeal are more fully set forth in the Assignment of Errors presented herewith pursuant to the Revised Rules of the Supreme Court of the United States, and there is likewise presented herewith, pursuant to said Rules, a

Statement as to the Jurisdiction of the Supreme Court of the United States in this cause.

[fol. 290] Wherefore your petitioners pray for the allowance of an appeal in the above-entitled cause from the said final order and judgment of the Court of Appeals of the State of New York and from the said judgment of the Supreme Court of the State of New York, Albany County, entered thereon, in order that the said judgment may be examined and reversed, and also pray that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of New York, Albany County, under his hand and seal of said court, may be sent to the Supreme Court of the United States, as provided by law, that an order be made touching the security to be required of your petitioners, and that the bond tendered by your petitioners be approved.

Hoopeston Canning Co., E. Pritchard, Inc., Lansing B. Warner, Incorporated, Harry M. Brown, James T. Smith, Paul E. Emerson, Allen A. Morton, Petitioners-Appellants, by Franklin D. Trueblood, Their Counsel.

[fols. 291-296] Exhibit 1 omitted. Printed side page 212, ante.

[fols. 297-298] Exhibit 2 omitted. Printed side page 3, ante.

[fols. 299-302] Exhibit 3 omitted. Printed side page 263, ante.

[fols. 303-304] Exhibit 4 omitted. Printed side page 267, ante.

[fols. 305-306] Exhibit 5 omitted. Printed side page 261, ante.

[fols. 307-309] Exhibit 6 omitted. Printed side page 279-B, ante.

[fols. 310-311] Exhibit 7 omitted. Printed side page 280, ante.

[fols. 312-313] Exhibit 8 omitted. Printed side page 282, ante.

[fol. 314] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed August 6, 1942

Now come Hoopeston Canning Co., a corporation, E. Pritchard, Inc., a corporation, Lansing B. Warner, Incorporated, a corporation, Harry M. Brown, James T. Smith, Paul E. Emerson, and Ben A. Morton, appellants herein and, in connection with their petition for appeal to the Supreme [fol. 315] Court of the United States, make and file this Assignment of Errors, to-wit, that the Court of Appeals of the State of New York erred:

1. In reversing the final order of the Appellate Division, Third Department, entered on September 2, 1941, and in ordering the complaints of appellants dismissed.

2. In refusing to hold certain sections or portions of the Insurance Law of 1939 of the State of New York (Chapter 882 of the Laws of 1939 of the State of New York, being Chapter 28 of the Consolidated Laws of said state) alleged in the complaints, to-wit,—that part of Section 130 as construed by the Court of Appeals of the State of New York that requires all appellants' contracts of inter-insurance insuring New York risks to be issued, or effectuated through, or countersigned by, an agent resident in New York, although all such contracts are made and to be performed outside of said state; that part of Section 168, subsection 2, that requires appellants' contracts of inter-insurance on New York risks to conform in all particulars

to the standard fire insurance policy of the State of New York; that part of Section 410, subsection 1, that imposes on the "Advisory Committee," subject to the Articles of Association and Power of Attorney, ultimate powers of management of the affairs of appellants' Subscribers (the persons exchanging the contracts of inter-insurance); Section 412, subsection 1; prohibiting anyone from cooperating in appellants' insurance who does not have net assets in an amount not less than ten thousand dollars, without reference to the amount of insurance he may require, or to the cost thereof; that part of Section 413, subsection 2, that requires appellants to build up and maintain a special contingent surplus in a stated amount; that part of Section 415, sub- [fol. 316] section 1, that requires the Power of Attorney to be executed in a manner sufficient for the acknowledgment of conveyances of real estate in the state in which the Subscriber is domiciled; that part of Section 415, subsection 1(d), that prescribes the method of electing members to appellants' Advisory Committee, and that part of Section 415, subsection 1(e), that requires the Advisory Committee to make regulations for the control and custody of funds; Section 417, subsection 1, requiring every one of appellants' contracts of inter-insurance to provide for a contingent liability in an amount of not less than one nor more than ten times the amount of "the annual premium expressed in such contract"; that part of Section 418, subsection 1, that requires each one of appellants Subscribers to build up an operating reserve in an amount equal to the larger of (a) Twice the amount of the so-called annual premium, or (b) The Subscriber's pro-rata share of an aggregate operating reserve of one-half of one per cent of the aggregate amount of insurance in force; Section 418, subsection 3, imposing a joint liability on each one of appellants Subscribers to the extent of the operating reserves; Section 420, subjecting all appellants' assets and the aforesaid operating reserves to the payment of liabilities under the contracts of inter-insurance; that part of Section 421 that requires of appellants that each Subscriber's account be credited with premiums earned by him as an underwriter; and that part of Section 422, subsection 1, that requires appellants to maintain at least one office in the State of New York,—invalid as being in violation of Section 1 of the Fourteenth Article of Amendment to the

Constitution of the United States because they purport to regulate, interfere with, and prohibit appellants' contracts of inter-insurance made and to be performed outside the [fol. 317] State of New York and thereby deprive appellants of their liberty and property without due process of law.

3. In refusing to hold the aforesaid statutes, and each of them, invalid as being in violation of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States because they purport to impose regulations upon appellants' contracts of inter-insurance that are unreasonable, arbitrary, and capricious, without any reasonable relation to the end sought to be attained, and thereby deprive appellants of their liberty and property without due process of law.

4. In refusing to hold the aforesaid statutes, and each of them, invalid as being in violation of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States because they impose regulations upon appellants that abridge the privileges and immunities of the citizens of the United States.

5. In refusing to hold the aforesaid Section 412, subsection 1, Section 417, subsection 1, and Section 418, subsection 1, of the Insurance Law of 1939 (Chapter 882 of the Laws of 1939 of the State of New York, being Chapter 28 of the Consolidated Laws of the said state), and each of them, invalid as being in violation of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States because they purport to impose regulations and prohibitions upon appellants' contracts of inter-insurance that are discriminatory against appellants in that said Section 412, subsection 1, denies to the small business man who does not have net assets of an amount in excess of ten thousand dollars, without reference to the amount of insurance he may require or to the cost thereof, the right to cooperate in this insurance, that said Section 417, subsection 1, requires every contract of inter-insurance to provide for a contingent liability in an amount of not less than one nor more than ten times the amount of "the annual premium expressed in such contract," whereas [fols. 318-319] Section 345, subsection 1, of the said Insur-

ance Law provides no limitation whatever to the contingent liability of members of a mutual fire insurance company, and said Section 418, subsection 1, purports to require operating reserves to be built up and carried by appellants as set out in paragraph 2 hereof, in excess of the reserves required to be built up and carried by insurance companies, and thereby deny to appellants the equal protection of the laws.

6. In refusing to hold that the State of New York may not attach a condition to appellants' retaining their New York licenses by requiring them to submit to the purported regulations and prohibitions of the aforesaid Section 130, Section 168, subsection 2, Section 410, subsection 1, Section 412, subsection 1, Section 413, subsection 2, Section 415, subsection 1, 1(d) and 1(e), Section 417, subsection 1, Section 418, subsections 1 and 3, Section 420, Section 421, and Section 422, subsection 1, of the Insurance Law of 1939 (Chapter 882 of the Laws of 1939 of the State of New York, being Chapter 28 of the Consolidated Laws of said state), and each of them, which statutes violate Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States in the manner set out in paragraphs 2, 3, 4, and 5 hereof.

For which errors the appellants pray that the final order and judgment of the Court of Appeals of the State of New York and the final order and judgment of the Supreme Court of the State of New York, Albany County, entered thereon be reversed and a judgment rendered in favor of the said appellants and for costs.

Hoopeston Canning Co., a Corporation; E. Pritchard, Inc., a Corporation; Lansing B. Warner, Incorporated, a Corporation, Harry M. Brown, James T. Smith, Paul E. Emerson, and Ben A. Morton, Appellants, by Franklin D. Trueblood, Their Counsel.

[fol. 320] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

HOOPESTON CANNING CO., a corporation, E. PRITCHARD, INC., a corporation, LANSING B. WARNER, INCORPORATED, a corporation, HARRY M. BROWN and JAMES T. SMITH, Plaintiffs-Appellants,

v.

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York, Defendants-Appellees

HOOPESTON CANNING CO., a corporation, E. PRITCHARD, INC., a corporation, LANSING B. WARNER, INCORPORATED, a corporation, PAUL E. EMERSON, and BEN A. MORTON, Plaintiffs-Appellants,

v.

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York, Defendants-Appellees

ORDER ALLOWING APPEAL—August 6, 1942

On this 6th day of August, 1942, on reading the petition for appeal to the Supreme Court of the United States from the final order of the Court of Appeals of the State of New York in the above entitled consolidated cause dated June 5, 1942 and entered on June 23, 1942, and from the final order and judgment of the Supreme Court of the State of New York, Albany County, dated and entered on June 23, 1942, upon the aforesaid order of the Court of Appeals; [fols. 321-322] which said petition was presented on August 6th, 1942; and on reading the assignment of errors, prayer for reversal, and statement as to jurisdiction, also presented by the appellants on said date, all pursuant to the statutes of the United States and to the Revised Rules of the Supreme Court of the United States in such case made and provided,

It Is Now And Hereby Ordered:

(1) That an appeal be, and the same is, hereby allowed to the Supreme Court of the United States from the said final

order of the Court of Appeals of the State of New York and from the judgment of the Supreme Court of the State of New York, Albany County, entered thereon, in the above entitled cause, as provided by law;

(2) That the Clerk of the Supreme Court of the State of New York, Albany County, shall prepare and certify a transcript of the record, proceedings and orders in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said Court within forty days of this date; and

(3) That security for costs on appeal be fixed in the sum of $500, and the appellants having prepared an undertaking in the sum of $500, executed by the appellants and American Surety Company of New York,

It Is Further Ordered that such undertaking be, and the same is hereby, approved.

Done this 6th day of August, 1942.

Robert H. Jackson, Associate Justice of the Supreme Court of the United States.

[fols. 323-326] Bond on Appeal for $500.00 approved and filed August 6, 1942, omitted in printing.

[fols. 327-329] Citation in usual form showing service on John J. Bennett, Jr., omitted in printing.

[fol. 330] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

It is hereby stipulated by and between counsel for the parties hereto that the Clerk of the Supreme Court, Albany County, in preparing the transcript of record for transmission to the Supreme Court of the United States shall include therein the following portions of the record:

1. Case on Appeal to Court of Appeals.
2. Decision of Court of Appeals filed June 4, 1942.
3. Order of Remittitur of Court of Appeals dated June 5, 1942.
[fols. 331-332] 4. Order of Supreme Court making order and judgment of Court of Appeals the order and judgment of Supreme Court entered June 23, 1942.
5. Judgment of Supreme Court entered June 23, 1942.
6. Plaintiffs' Exhibits in evidence, Nos. 1 to 23, both inclusive and 26 and 26. (Defendants' Exhibits in evidence A to P, both inclusive, which are omitted from the transcript of record, are summarized in Defendants' Requested Finding of Fact No. 10 as found by the Trial Term.) Also photostatic copies of pages 8, 17 and 19 of defendants' Exhibits H and P.
7. Petition for Appeal to Supreme Court of the United States.
8. Assignment of Errors.
9. Jurisdictional Statement.
10. Order allowing Appeal to Supreme Court of the United States.
11. Cost Bond on Appeal.
12. Citation.
13. Proof of service upon appellees of copy of petition for and order allowing appeal, together with a copy of the Assignment of Error and Jurisdictional Statement and of statement directing attention to provisions of Rule 12, paragraph 3, of the Supreme Court of the United States.
14. All other statements or motions required and permitted to be filed under Rule 12 of the Supreme Court of the United States.
15. Copy of this stipulation.
16. Certificate of Clerk of Supreme Court, Albany County, to transcript of record.

Dated this 28th day of August, 1942.

Franklin D. Trueblood, Counsel for Appellants.
John J. Bennett, Jr., Attorney-General, Counsel for Appellees. By Milton Kaplan, Assistant Attorney-General.

PLAINTIFFS' EXHIBIT 1

STATE OF ILLINOIS
DEPARTMENT OF INSURANCE

WHEREAS, ~~the~~ LANSING B. WARNER, INCORPORATED Attorney-in-Fact for the CANNERS EXCHANGE SUBSCRIBERS AT WARNER INTER INSURANCE BUREAU located at Chicago in the State of Illinois has complied with all the requirements of the "ILLINOIS INSURANCE CODE" applicable to said Company:

NOW, THEREFORE, I, the undersigned, Director of Insurance of the State of Illinois, do hereby certify that the said Company is authorized to transact its appropriate business as set forth under clause(s) (a), (b), (c), (d), (Cargo only), (e), (f), (Excluding crops) of Class 3 of Section 4 of the "ILLINOIS INSURANCE CODE" in this State, in accordance with the laws thereof.

(e), (f), (Excluding crops)

of Class 3 of Section 4 of the "ILLINOIS INSURANCE CODE" in this State, in accordance with the laws thereof.

In Testimony Whereof, *I hereto set my hand and cause to be affixed the Seal of my office.*

Done at the City of Springfield this Tenth

day of February *A. D. 19* 39.

Ernest Palmer

Director of Insurance

UNITED STATES OF AMERICA,
STATE OF ILLINOIS, } ss.
Office of SECRETARY OF STATE,

I, EDWARD J. HUGHES, Secretary of State of the State of Illinois, hereby certify that

ERNEST PALMER

is now, and has been since THE 1ST day of JULY A. D. 1933

State of Illinois

duly commissioned and qualified, and that as such, full faith and credit is, and ought to be, given to his official

State of Illinois

duly commissioned and qualified, and that as such, full faith and credit is, and ought to be, given to his official

attestations,

IN TESTIMONY WHEREOF, I hereto set my hand and cause to be affixed the Great Seal of State.

Done at the City of Springfield, this 14TH day of MARCH A. D. 1940

Edward J. Hughes

Secretary of State

333-335

PLAINTIFFS EXHIBIT 2

STATE OF ILLINOIS
DEPARTMENT OF INSURANCE

WHEREAS, ~~the~~ LANSING B. WARNER, INCORPORATED Attorney-in-Fact for the WARNER RECIPROCAL INSURERS located at Chicago in the State of Illinois has complied with all the requirements of the "ILLINOIS INSURANCE CODE" applicable to said Company:

NOW, THEREFORE, I, the undersigned, Director of Insurance of the State of Illinois, do hereby certify that the said Company is authorized to transact its appropriate business as set forth under clause(s) (a), (b), (c), (d), (Cargo only), (e), (f), (Excluding crops) of Class 3 of Section 4 of the "ILLINOIS INSURANCE CODE" in this State, in accordance with the laws thereof.

(e), (f), (Excluding crops)

of Class 3 of Section 4 of the "ILLINOIS INSURANCE CODE" in this State, in accordance with the laws thereof.

In Testimony Whereof, *I hereto set my hand and cause to be affixed the Seal of my office.*

Done at the City of Springfield this Tenth *day of* February *A. D. 19* 39.

Ernest Palmer

Director of Insurance

UNITED STATES OF AMERICA,
STATE OF ILLINOIS,
Office of SECRETARY OF STATE, } ss.

I, EDWARD J. HUGHES, Secretary of State of the State of Illinois, hereby certify that

ERNEST PALMER

is now, and has been since THE 1ST day of JULY A. D. 19 33

DIRECTOR OF INSURANCE

State of Illinois

duly commissioned and qualified, and that as such, full faith and credit is, and ought to be, given to his official

ERNEST PALMER

is now, and has been since THE 1ST day of JULY A. D. 19 33

DIRECTOR OF INSURANCE

State of Illinois

duly commissioned and qualified, and that as such, full faith and credit is, and ought to be, given to his official attestations,

IN TESTIMONY WHEREOF, I hereto set my hand and cause to be affixed the Great Seal of State.

Done at the City of Springfield, this 14TH day of MARCH A. D. 19 40

Edward J. Hunter

Secretary of State

(87496—2M—11-32) 2

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PLAINTIFF'S' EXHIBIT 4

CANNERS EXCHANGE SUBSCRIBERS

AT WARNER INTER-INSURANCE BUREAU

LANSING B. WARNER, INCORPORATED, ATTORNEY

540 N. MICHIGAN AVE.

CHICAGO

Date _____

Please Issue Insurance Policies to Cover Our Property as Follows:

Effective Date of Policy	Coverage		Location	Amount	Term (No. of Months)	Estimate	Town and State
	State Whether Building, Machinery, Stock or Contents	*State Type of Insurance	Show In or On Which Building the Insurance Is Desired; Indicate Street Name and Number, If Any				

*Such as:
F —Fire
WH—Windstorm and Hail
W. —Windstorm (Without Hail)
RL —Riot and Civil Commotion (Limited Form)
R —Riot and Civil Commotion (Complete Form)
UO —Production Earnings or Use and Occupancy
E —Extended Coverage

Signed

By _____

NOTE: IF WE CARRY NO INSURANCE ON ANY OF THE ABOVE ITEMS NOW, PLEASE FURNISH US WITH A COPY OF THE FORM IN USE OR INCLUDE A DESCRIPTION OF THE PROPERTY

REMARKS (Continue Over):

of Policy	Building, Machinery, Stock or Contents	Type of Insurance	Show in or on which building the Insurance is Desired; Indicate Street Name and Number, if Any	Amount	(No. of Months)	Estimate	Town and State

*Such as:
F —Fire
WH—Windstorm and Hail
W —Windstorm (Without Hail)
RL —Riot and Civil Commotion (Limited Form)
R —Riot and Civil Commotion (Complete Form)
UO —Production Earnings or Use and Occupancy
E —Extended Coverage

Signed

By

NOTE: IF WE CARRY NO INSURANCE ON ANY OF THE ABOVE ITEMS NOW, PLEASE FURNISH US WITH A COPY OF THE FORM IN USE OR INCLUDE A DESCRIPTION OF THE PROPERTY

REMARKS (Continue Over):

OFFICE RECORDS (Leave Blank):

S_____ S.C._____ _____ Und_____ F.R._____

Form U-109

PLAINTIFF'S EXHIBIT 5

Warner Reciprocal Insurers

Appointment of Agent

COPYRIGHT 1925
BY
LANSING B. WARNER, INCORPORATED

Warner Reciprocal Insurers

Appointment of Agent

The UNDERSIGNED (hereinafter called "Principal") hereby appoints LANSING B. WARNER, INCORPORATED, a corporation of the State of Illinois, U. S. A., (hereinafter called "Agent") the agent of the Principal, with the authority and subject to the conditions following:

1. The individuals, partnerships and corporations (including the Principal) exchanging insurance pursuant to an instrument of the form, tenor and effect hereof, executed and delivered to the Agent by each of them, are for convenience hereinafter called "Insurers."

2. The Agent is authorized, for and in behalf of the Principal,

(a) To effect an exchange of insurance between the Principal and other Insurers by means of reciprocal contracts of insurance made in the manner and form and with the terms and conditions determined by the Agent, and for convenience hereinafter called "Insurance Contracts"; to use on or in connection with the Insurance Contracts the designation "Warner Reciprocal Insurers"; to execute the Insurance Contracts by the use of such designation; and to change, cancel, renew or extend the Insurance Contracts, and to reinsure the risks covered thereby;

(b) To give and to receive all notices necessary or proper, and to adjust, compromise or settle all claims or losses, under or in connection with any of the Insurance Contracts;

(c) To bring, prosecute, appear in, defend, compromise, settle, adjust or otherwise deal with, in the discretion of the Agent, any suit, action or proceeding at law or in equity for the enforcement of or arising from or on account of any of the Insurance Contracts, or arising from or on account of this instrument or any contract made pursuant to the terms hereof, and in connection therewith to employ counsel;

(d) To appoint an agent or representative in any state, territory or country upon whom service of process may be had in any suit, action or proceeding brought upon any Insurance Contract, or any contract made pursuant to the terms hereof, and to comply with any requirement of law, hereby accepting and adopting as binding on the Principal any such appointment and compliance heretofore made;

(e) To do and perform every act or thing whatsoever, necessary or proper, in order fully to carry out and perform the authority and the conditions hereof, including the execution in due form of law, the acknowledgment when necessary, and the delivery, of all documents and papers.

3. An exchange of insurance between the Principal and other Insurers will be effected whenever there are outstanding and in force one or more Insurance Contracts in favor of the Principal and also one or more Insurance Contracts in favor of any other or others of the Insurers, the liability of the Principal resulting from such exchange being that hereinafter described. The consideration for all Insurance Contracts other than the stipulations and conditions thereof, shall not be a premium but solely the exchange of insurance. Insurance Contracts in favor of the Principal shall only be made upon the request or with the consent of the Principal.

4. The Principal will deposit with the Agent, upon the latter's request, in connection with each Insurance Contract made in favor of the Principal, such sum or sums as the Agent shall determine in accordance with the risk and the amount and term of the insurance covered thereby, to be denominated "Guaranty Deposit" and to be held and disposed of, as in this instrument described, as a several, separate and individual fund of the Principal, by which fund the payment of the hereinafter described liabilities of the Principal will be secured and out of which fund, to the extent thereof, such liabilities will be paid.

5. For convenience in accounting and for the determination of the Principal's liability resulting from the exchange of insurance, each month for which the term begins. The parts of all the Guaranty Deposits of the Principal assigned to any one month will be added together and the result will be what for convenience is called the Liability Factor of the Principal for that month. In like manner the Liability Factor of each of the other Insurers for any one month will be ascertained. Should an Insurance Contract be canceled or a change by increase or decrease be made in the amount of a Guaranty Deposit because of a variation in the risk or amount of insurance or any other cause, the Liability Factor will be altered as the case may require.

6. In each month for which the Principal has a Liability Factor, the Principal will, as the result of the exchange of insurance, be liable,

(a) On each Insurance Contract, for that proportion of the aggregate liability arising thereunder for a loss occurring in the month, which the Liability Factor of the Principal for the month bears to the aggregate of the Liability Factors of all Insurers, including the Principal, for the month; and

(b) In respect to the expenses incurred in behalf of the Principal and other Insurers by virtue of this and other like instruments (other than the expenses for which the Agent alone is liable), for a like proportion of the amount thereof paid in the month.

Each of these liabilities will be the several, separate and individual liability of the Principal (not joint with any other of the Insurers) for the proportion thus ascertained, to be deducted and paid from any funds to the credit of the Principal as shown by the accounts kept by the Agent, or in case such funds are not sufficient for the purpose, such liability will, upon the Agent's request, be paid by the Principal to the Agent.

7. No Insurance Contract will be made by the Agent whereby the several, separate and individual liability of the Principal on any one individual risk will exceed an amount equal to the total of the Guaranty Deposits in connection with all Insurance Contracts made in favor of the Principal in force at any time during the month in which a liability of the Principal in respect to a loss arises. The Agent shall be the sole judge of what constitutes one individual risk.

8. For the benefit of the Principal as well as the Agent there will be a council of five members called "Advisors," who will exercise the authority and perform the duties given to or imposed upon them by this instrument. A register of the name and address of each Advisor will be kept by the Agent at its office and will be subject to the inspection of the Principal either in person or by duly authorized representative. The present Advisors as shown by such register are hereby approved by the Principal. An Advisor will be disqualified to act as such unless he, or a partnership of which he is a member, or a corporation of which he is an officer or a director, is one of the Insurers. In case of the disqualification, death, resignation or refusal or inability to act of an Advisor, a new Advisor will be designated in a writing signed by the remaining Advisors or a majority of them and filed with the Agent. The Principal will be informed from time to time of any change in the Advisors and the name of any new Advisor. Whenever meetings of the Advisors become necessary or desirable for conference, counsel and advice respecting questions proposed by the Agent or the exercise of the authority and the performance of the duties of the Advisors, such meetings will be held at the office of the Agent, at which an officer of the Agent will be present and act as Secretary. Such meetings may be held either at regular intervals as agreed upon by the Agent and a majority of the Advisors or on the call of the Agent or any one of the Advisors by notice thereof given to the

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selected by the Agent and approved by a majority of the Advisors. With the exception hereinafter made the account month, and after such deductions if there be a balance

executed and delivered to the Agent by each of them, are for convenience hereinafter called "Insurers."

2. The Agent is authorized, for and in behalf of the Principal,

(a) To effect an exchange of insurance between the Principal and other Insurers by means of reciprocal contracts of insurance made in the manner and form and with the terms and conditions determined by the Agent, and for convenience hereinafter called "Insurance Contracts"; to use on or in connection with the Insurance Contracts the designation "Warner Reciprocal Insurers"; to execute the Insurance Contracts by the use of such designation; and to change, cancel, renew or extend the Insurance Contracts, and to reinsure the risks covered thereby;

(b) To give and to receive all notices necessary or proper, and to adjust, compromise or settle all claims or losses, under or in connection with any of the Insurance Contracts;

(c) To bring, prosecute, appear in, defend, compromise, settle, adjust or otherwise deal with, in the discretion of the Agent, any suit, action or proceeding at law or in equity for the enforcement of or arising from or on account of any of the Insurance Contracts, or arising from or on account of this instrument or any contract made pursuant to the terms hereof, and in connection therewith to employ counsel;

(d) To appoint an agent or representative in any state, territory or country upon whom service of process may be had in any suit, action or proceeding brought upon any Insurance Contract, or any contract made pursuant to the terms hereof, and to comply with any requirement of law, hereby accepting and adopting as binding on the Principal any such appointment and compliance herptofore made;

(e) To do and perform every act or thing whatsoever, necessary or proper, in order fully to carry out and perform the authority and the conditions hereof, including the execution in due form of law, the acknowledgment when necessary, and the delivery, of all documents and papers.

3. An exchange of insurance between the Principal and other Insurers will be effected whenever there are outstanding and in force one or more Insurance Contracts in favor of the Principal and also one or more Insurance Contracts in favor of any other or others of the Insurers, the liability of the Principal resulting from such exchange being that hereinafter described. The consideration for all Insurance Contracts other than the stipulations and conditions thereof, shall not be a premium but solely the exchange of insurance. Insurance Contracts in favor of the Principal shall only be made upon the request or with the consent of the Principal.

4. The Principal will deposit with the Agent, upon the latter's request, in connection with each Insurance Contract made in favor of the Principal, such sum or sums as the Agent shall determine in accordance with the risk and the amount and term of the insurance covered thereby, to be denominated "Guaranty Deposit" and to be held and disposed of, as in this instrument described, as a several, separate and individual fund of the Principal, by which fund the payment of the hereinafter described liabilities of the Principal will be secured and out of which fund, to the extent thereof, such liabilities will be paid.

5. For convenience in accounting and for the determination of the Principal's liability resulting from the exchange of insurance, each Guaranty Deposit will be divided into monthly parts, that is to say into as many parts as there are months in the term of the Insurance Contract to which the Guaranty Deposit relates, and one of such parts will be assigned to each successive month, beginning with the month next following that in

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venience is called the Liability Factor of the Principal for that month. In like manner the Liability Factor of each of the other Insurers for any one month will be ascertained. Should an Insurance Contract be canceled or a change by increase or decrease be made in the amount of a Guaranty Deposit because of a variation in the risk or amount of insurance or any other cause, the Liability Factor will be altered as the case may require.

6. In each month for which the Principal has a Liability Factor, the Principal will, as the result of the exchange of insurance, be liable,

(a) On each Insurance Contract, for that proportion of the aggregate liability arising thereunder for a loss occurring in the month, which the Liability Factor of the Principal for the month bears to the aggregate of the Liability Factors of all Insurers, including the Principal, for the month; and

(b) In respect to the expenses incurred in behalf of the Principal and other Insurers by virtue of this and other like instruments (other than the expenses for which the Agent alone is liable), for a like proportion of the amount thereof paid in the month.

Each of these liabilities will be the several, separate and individual liability of the Principal (not joint with any other of the Insurers) for the proportion thus ascertained, to be deducted and paid from any funds to the credit of the Principal as shown by the accounts kept by the Agent, or in case such funds are not sufficient for the purpose, such liability will, upon the Agent's request, be paid by the Principal to the Agent.

7. No Insurance Contract will be made by the Agent whereby the several, separate and individual liability of the Principal on any one individual risk will exceed an amount equal to the total of the Guaranty Deposits in connection with all Insurance Contracts made in favor of the Principal in force at any time during the month in which a liability of the Principal in respect to a loss arises. The Agent shall be the sole judge of what constitutes one individual risk.

8. For the benefit of the Principal as well as the Agent there will be a council of five members called "Advisors," who will exercise the authority and perform the duties given to or imposed upon them by this instrument. A register of the name and address of each Advisor will be kept by the Agent at its office and will be subject to the inspection of the Principal either in person or by duly authorized representative. The present Advisors as shown by such register are hereby approved by the Principal. An Advisor will be disqualified to act as such unless he, or a partnership of which he is a member, or a corporation of which he is an officer or a director, is one of the Insurers. In case of the disqualification, death, resignation or refusal or inability to act of an Advisor, a new Advisor will be designated in a writing signed by the remaining Advisors or a majority of them and filed with the Agent. The Principal will be informed from time to time of any change in the Advisors and the name of any new Advisor. Whenever meetings of the Advisors become necessary or desirable for conference, counsel and advice respecting questions proposed by the Agent or the exercise of the authority and the performance of the duties of the Advisors, such meetings will be held at the office of the Agent, at which an officer of the Agent will be present and act as Secretary. Such meetings may be held either at regular intervals as agreed upon by the Agent and a majority of the Advisors or on the call of the Agent or any one of the Advisors by notice thereof given to the Agent and to each Advisor in a manner previously agreed upon by the Agent and a majority of the Advisors. The fees and expenses of the Advisors will be such as are agreed upon from time to time in writing by the Agent and a majority of the Advisors.

9. All sums received by the Agent from or on account of the Principal will be deposited in one or more banks

selected by the Agent and approved by a majority of the Advisors. With the exception hereinafter made the account or accounts in such bank or banks will be distinguished by the title Warner Reciprocal Insurers General Account or by such other appropriate title as the Agent may determine and will be subject to check or draft signed by the Agent and countersigned by one of the Advisors or by someone appointed for the purpose by a majority of the Advisors. Any of the funds of the Principal may from time to time be invested by the Agent in securities approved by a majority of the Advisors, and all such securities will be placed in the custody of a depositary selected by the Agent and approved by a majority of the Advisors, to be withdrawn from such custody by an order signed by the Agent and countersigned by one of the Advisors or by someone appointed for the purpose by a majority of the Advisors. The sums received by the Agent from or on account of any other of the Insurers may be deposited in the same accounts and the funds of any other of the Insurers may be invested in the same securities.

10. When a loss occurs under an Insurance Contract and a claim therefor is made by the insured, the Principal's proportion of the amount of the claim may, in the discretion of the Agent, be taken from the funds of the Principal (or if those funds are insufficient the deficiency will be promptly supplied by the Principal) and set aside in a separate bank account distinguished by the title Warner Reciprocal Insurers Loss Reserve Account or by such other appropriate title as the Agent may determine, which account will be subject to check or draft signed by the Agent only. The Principal's proportion thus set aside will constitute a special fund to be used by the Agent in the payment of the liability of the Principal in respect to such loss when and to the extent its validity and amount are established in a manner lawful and binding upon the Principal. Any deficiency in the amount thus set aside will be supplied by, and any excess therein will be restored to, the Principal.

11. Accurate records and accounts will be kept by the Agent of all sums received or due from or on account of the Principal and of all sums paid out for or on account of the Principal, as well as of all other transactions contemplated hereby. Such records and accounts will be subject to the inspection of the Advisors and the latter will make or cause to be made examinations thereof from time to time for the purpose of verifying their accuracy and correctness. The Principal, upon request, will be supplied by the Agent with a statement exhibiting the condition of the Principal's account or accounts. All books, documents, papers, correspondence and files containing such records and accounts or relating thereto will belong to and shall be and remain the property of the Agent.

12. The Agent will be entitled to compensation in an amount equal to twenty per cent. of each sum due from the Principal as a Guaranty Deposit, and as and when required by the Agent, such compensation will be deducted and paid from any funds to the credit of the Principal as shown by the accounts kept by the Agent, or in case such funds are not sufficient for the purpose, such compensation will be paid by the Principal. The Principal's liability for this compensation will be the several, separate and individual liability of the Principal (not joint with any other of the Insurers).

13. In consideration of the compensation paid to the Agent as herein provided, the Agent will pay all expenses of every kind in the execution and performance of the authority and conditions hereof, except cost of adjustment and settlement of losses and expenses incident thereto, cost of reinsurance, counsel fees, costs and expenses of litigation, taxes, legal expenses and assessments, license fees, expenses of fire patrol, expenses of rating and inspection bureaus and other expenses imposed by law, expenses for the protection of the interests of the Principal, fees and expenses of the Advisors, and expenses incident to the investment and custody of funds and securities.

14. From the amount of the Liability Factor of the Principal for each month there will be deducted the Agent's compensation from the Principal paid in the month, and the Principal's proportion of the aggregate liability, or of the claim therefor as the case may be, month, and after such deductions if there be a balance it will be credited, and if there be a deficit it will be charged, to an account of the Principal on the books of the Agent denominated "Savings Account." There will also be carried to this Savings Account any miscellaneous items of credit or charge not hereinbefore provided for, except that where a Guaranty Deposit is reduced on account of the cancellation of an Insurance Contract or a variation in the risk or amount of Insurance or any other cause, that part of the reduction in excess of the necessary reserve will be returned to the Principal and not carried to the Savings Account.

15. The net credit balance of the Savings Account of the Principal at the end of each calendar year will, within a reasonable time thereafter, be disposed of as follows: (a) one-fifth of such credit balance will be paid to the Agent as additional compensation; (b) an amount determined by the Agent with the approval of a majority of the Advisors, but not exceeding one-half of such credit balance, will be set aside as a part of a several, separate and individual fund of the Principal to be created and denominated "Reserve Fund"; and (c) the remainder of such credit balance will be remitted to the Principal.

16. The Reserve Fund will be held as additional security for the payment of the liabilities of the Principal herein described, out of which such liabilities or any part thereof will be paid whenever other funds arising from the Guaranty Deposits of the Principal are insufficient. In case at any time the total Reserve Fund of the Principal exceeds an amount which is twice the average annual Guaranty Deposits of the Principal or such lesser amount as the Agent with the approval of a majority of the Advisors considers sufficient, the excess will be remitted to the Principal.

17. This instrument shall not be construed, nor shall any like instrument or any one or more of the Insurance Contracts or any combination of such instruments and Insurance Contracts or either of them be construed, so as to create between the Principal and the other Insurers or any of them any association (voluntary or involuntary) or partnership or mutual insurance company or other organization of any kind.

18. The Agent will maintain an office in Chicago, Illinois, where the exchange of insurance hereunder will occur and where all accounts, books and records in connection with the transactions contemplated hereby will be kept, and from which Insurance Contracts will issue. With the approval of a majority of the Advisors, the Agent may transfer its office to any other place or places in the United States and at such other place or places carry out and perform the authority and the conditions hereof without prejudice to any provision of this instrument or of any Insurance Contract theretofore made, provided, prior to such transfer, a notice thereof in writing shall be given to the Principal. Each Insurance Contract, so far as the obligation of the Principal thereunder is concerned, will be regarded as a contract made and to be performed at the office of the Agent from which it issued.

19. At any time when no Insurance Contract in favor of the Principal is outstanding and in force and all the liabilities of the Principal herein described have been satisfied, this instrument may be canceled by either the Principal or the Agent provided notice thereof in writing is given by the one desiring cancellation to the other. Within sixty days after such cancellation, the Agent will account for and there will be paid to the Principal any funds of the Principal not theretofore accounted for, after deducting and paying to the Agent its additional compensation of one-fifth of the credit balance of the Savings Account of the Principal at the time of cancellation.

Dated_____

(Sign below)

and approved by a majority of the Advisors, to be withdrawn from such custody by an order signed by the Agent and countersigned by one of the Advisors or by someone appointed for the purpose by a majority of the Advisors. The sums received by the Agent from or on account of any other of the Insurers may be deposited in the same accounts and the funds of any other of the Insurers may be invested in the same securities.

10. When a loss occurs under an Insurance Contract and a claim therefor is made by the insured, the Principal's proportion of the amount of the claim may, in the discretion of the Agent, be taken from the funds of the Principal (or if those funds are insufficient the deficiency will be promptly supplied by the Principal) and set aside in a separate bank account distinguished by the title Warner Reciprocal Insurers Loss Reserve Account or by such other appropriate title as the Agent may determine, which account will be subject to check or draft signed by the Agent only. The Principal's proportion thus set aside will constitute a special fund to be used by the Agent in the payment of the liability of the Principal in respect to such loss when and to the extent its validity and amount are established in a manner lawful and binding upon the Principal. Any deficiency in the amount thus set aside will be supplied by, and any excess therein will be restored to, the Principal.

11. Accurate records and accounts will be kept by the Agent of all sums received or due from or on account of the Principal and of all sums paid out for or on account of the Principal, as well as of all other transactions contemplated hereby. Such records and accounts will be subject to the inspection of the Advisors and the latter will make or cause to be made examinations thereof from time to time for the purpose of verifying their accuracy and correctness. The Principal, upon request, will be supplied by the Agent with a statement exhibiting the condition of the Principal's account or accounts. All books, documents, papers, correspondence and files containing such records and accounts or relating thereto will belong to and shall be and remain the property of the Agent.

12. The Agent will be entitled to compensation in an amount equal to twenty per cent. of each sum due from the Principal as a Guaranty Deposit, and as and when required by the Agent, such compensation will be deducted and paid from any funds to the credit of the Principal as shown by the accounts kept by the Agent, or in case such funds are not sufficient for the purpose, such compensation will be paid by the Principal. The Principal's liability for this compensation will be the several, separate and individual liability of the Principal (not joint with any other of the Insurers).

13. In consideration of the compensation paid to the Agent as herein provided, the Agent will pay all expenses of every kind in the execution and performance of the authority and conditions hereof, except cost of adjustment and settlement of losses and expenses incident thereto, cost of reinsurance, counsel fees, costs and expenses of litigation, taxes, legal expenses and assessments, license fees, expenses of fire patrol, expenses of rating and inspection bureaus and other expenses imposed by law, expenses for the protection of the interests of the Principal, fees and expenses of the Advisors, and expenses incident to the investment and custody of funds and securities.

14. From the amount of the Liability Factor of the Principal for each month there will be deducted the Agent's compensation from the Principal paid in the month, and the Principal's proportion of the aggregate liability, or of the claim therefor as the case may be, arising under each Insurance Contract for a loss occurring in the month, whether set aside in the Warner Reciprocal Insurers Loss Reserve Account or not, and also the Principal's proportion of the amount of expenses paid in the month in the custody of a depositary selected by the Agent to the Savings Account.

15. The net credit balance of the Savings Account of the Principal at the end of each calendar year will, within a reasonable time thereafter, be disposed of as follows: (a) one-fifth of such credit balance will be paid to the Agent as additional compensation; (b) an amount determined by the Agent with the approval of a majority of the Advisors, but not exceeding one-half of such credit balance, will be set aside as a part of a several, separate and individual fund of the Principal to be created and denominated "Reserve Fund"; and (c) the remainder of such credit balance will be remitted to the Principal.

16. The Reserve Fund will be held as additional security for the payment of the liabilities of the Principal herein described, out of which such liabilities or any part thereof will be paid whenever other funds arising from the Guaranty Deposits of the Principal are insufficient. In case at any time the total Reserve Fund of the Principal exceeds an amount which is twice the average annual Guaranty Deposits of the Principal or such lesser amount as the Agent with the approval of a majority of the Advisors considers sufficient, the excess will be remitted to the Principal.

17. This instrument shall not be construed, nor shall any like instrument or any one or more of the Insurance Contracts or any combination of such instruments and Insurance Contracts or either of them be construed, so as to create between the Principal and the other Insurers or any of them any association (voluntary or involuntary) or partnership or mutual insurance company or other organization of any kind.

18. The Agent will maintain an office in Chicago, Illinois where the exchange of insurance hereunder will occur and where all accounts, books and records in connection with the transactions contemplated hereby will be kept, and from which Insurance Contracts will issue. With the approval of a majority of the Advisors, the Agent may transfer its office to any other place or places in the United States and at such other place or places carry out and perform the authority and the conditions hereof without prejudice to any provision of this instrument or of any Insurance Contract theretofore made, provided, prior to such transfer, a notice thereof in writing shall be given to the Principal. Each Insurance Contract, so far as the obligation of the Principal thereunder is concerned, will be regarded as a contract made and to be performed at the office of the Agent from which it issued.

19. At any time when no Insurance Contract in favor of the Principal is outstanding and in force and all the liabilities of the Principal herein described have been satisfied, this instrument may be canceled by either the Principal or the Agent provided notice thereof in writing is given by the one desiring cancellation to the other. Within sixty days after such cancellation, the Agent will account for and there will be paid to the Principal any funds of the Principal not theretofore accounted for, after deducting and paying to the Agent its additional compensation of one-fifth of the credit balance of the Savings Account of the Principal at the time of cancellation.

Dated_____

(Sign below)

_____

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When this Appointment of Agent is made by a corporation, it should be signed in the name of the corporation by the President or some other executive officer with authority, and attested by the Secretary or Assistant Secretary, with the corporate seal attached.

PLAINTIFFS' EXHIBIT 6

Canners Exchange Subscribers

at

Warner Inter-Insurance Bureau

Power of Attorney

COPYRIGHT 1912
BY
LANSING B. WARNER, INCORPORATED

Canners Exchange Subscribers' Inter-Insurance

WHEREAS, LANSING B. WARNER, INCORPORATED, has established at its office in Chicago, Illinois, a bureau known as "Warner Inter-Insurance Bureau," where persons, firms and corporations executing and delivering a power of attorney of the form, tenor and effect hereof, (hereinafter called "Subscribers,") may exchange insurance among themselves;

NOW, THEREFORE, Lansing B. Warner, Incorporated, (hereinafter called the "Attorney,") is hereby made, constituted and appointed the true and lawful attorney and agent of the undersigned, for and in the behalf of the undersigned, to act as follows:

(a) to exchange insurance among Subscribers; to execute and deliver to Subscribers policies of insurance containing such terms and conditions as the Attorney shall deem proper; to change, cancel, renew, extend or re-insure such policies; and to subscribe such policies, as follows: "Canners Exchange Subscribers at Warner Inter-Insurance Bureau;"

(b) to demand and receive all moneys which may become due under this or any other like power of attorney executed by any of the Subscribers or under any such policy of insurance;

(c) to give and to receive all notices necessary or proper under any such policy of insurance, and to adjust, compromise and settle all claims and losses thereunder;

(d) to bring, prosecute, appear in, defend, compromise, settle or adjust, any suit, action or proceeding, at law or in equity, as the Attorney shall deem proper, for the enforcement of, or arising om, or on account of, any such policies of insurance, or any of the terms and conditions thereof, and in connection therewith to employ counsel;

(e) to appoint an agent or representative upon whom service of process may be had in any suit, action or proceeding aforesaid, in any state under the laws of which such appointment is now or may hereafter become necessary, hereby confirming and adopting as binding upon the undersigned all appointments of service of process heretofore made;

(f) and to do and perform every other act and thing whatsoever necessary and proper to be done in order to fully carry out and perform the power, authority, terms and conditions hereof, including the execution in due form of law, the acknowledgment where necessary, and the delivery of all documents and papers;

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SUBJECT, HOWEVER, to the following conditions, namely:

1. No policy of insurance shall be executed or delivered by virtue hereof except upon the property of canners, preservers and pickle packers, and similar and allied interests.

2. No policy of insurance shall be executed or delivered by virtue hereof whereby the undersigned may become jointly liable with other Subscribers or any of them, or whereby the undersigned may become liable in any manner for the performance of any contract of any other person, firm or corporation, or which may bind the undersigned otherwise than to a several, individual liability.

3. No premium shall be charged for any policy of insurance, the consideration being the exchange of indemnity, but the undersigned will deposit with the Attorney at the time each policy is issued to the undersigned, such a sum as the Attorney shall deem proper, to be designated "Expense and Guarantee Fund," and to be held and disposed of as hereinafter provided.

4. In addition to such Expense and Guarantee Fund deposit, the undersigned will, upon the request of the Attorney, deposit with the Attorney the sum of ten dollars, to be designated "Reserve Fund." The amount of the Reserve Fund deposit of the undersigned may, at the option of the undersigned, be increased to a sum in excess of ten dollars, provided the total Reserve Fund deposit or deposits of the undersigned shall not at any one time exceed an average of two dollars for each full one thousand dollars of insurance carried by the undersigned hereunder. The Reserve Fund deposit or deposits of the undersigned shall be credited to the separate, individual account of the undersigned as a distinct item or items, under the designation, "Reserve Fund." Except as the amount of the Reserve Fund deposit or deposits of the undersigned may be reduced from time to time by the return to the undersigned of the excess thereof over and above the average of two dollars for each full one thousand dollars of insurance carried by the undersigned hereunder, the Reserve Fund deposit or deposits of the undersigned shall be maintained intact at all times. All of the Reserve Fund deposits aforesaid shall be held and disposed of as hereinafter provided.

5. The Attorney shall be allowed a sum equal to twenty per cent. of the total Expense and Guarantee Fund deposited or agreed to be deposited by the undersigned, and the Attorney is hereby authorized to deduct and retain such sum from any moneys received by the Attorney or the Advisory Committee (hereinafter mentioned) for the credit of the account of the undersigned, in consideration of which the Attorney shall pay all expenses of every kind in the execution of the power and authority hereby granted, except the payment of losses, expenses incident to the adjustment and settlement of losses (other than adjuster's fees and expenses), counsel fees, costs and expenses of litigation, taxes, legal expenses and assessments, license fees, expenses of fire patrol, fees and expenses of the Advisory Committee and expenses

(a) to exchange insurance among Subscribers; to execute and deliver to Subscribers policies of insurance containing such terms and conditions as the Attorney shall deem proper; to change, cancel, renew, extend or re-insure such policies; and to subscribe such policies, as follows: "Canners Exchange Subscribers at Warner Inter-Insurance Bureau;"

(b) to demand and receive all moneys which may become due under this or any other like power of attorney executed by any of the Subscribers or under any such policy of insurance;

(c) to give and to receive all notices necessary or proper under any such policy of insurance, and to adjust, compromise and settle all claims and losses thereunder;

(d) to bring, prosecute, appear in, defend, compromise, settle or adjust, any suit, action or proceeding, at law or in equity, as the Attorney shall deem proper, for the enforcement of, or arising from, or on account of, any such policies of insurance, or any of the terms and conditions thereof, and in connection therewith to employ counsel;

(e) to appoint an agent or representative upon whom service of process may be had in any suit, action or proceeding aforesaid, in any state under the laws of which such appointment is now or may hereafter become necessary, hereby confirming and adopting as binding upon the undersigned all appointments of service of process heretofore made;

(f) and to do and perform every other act and thing whatsoever necessary and proper to be done in order to fully carry out and perform the power, authority, terms and conditions hereof, including the execution in due form of law, the acknowledgment where necessary, and the delivery of all documents and papers;

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SUBJECT, HOWEVER, to the following conditions, namely:

1. No policy of insurance shall be executed or delivered by virtue hereof except upon the property of canners, preservers and pickle packers, and similar and allied interests.

2. No policy of insurance shall be executed or delivered by virtue hereof whereby the undersigned may become jointly liable with other Subscribers or any of them, or whereby the undersigned may become liable in any manner for the performance of any contract of any other person, firm or corporation, or which may bind the undersigned otherwise than to a several, individual liability.

3. No premium shall be charged for any policy of insurance, the consideration being the exchange of indemnity, but the undersigned will deposit with the Attorney at the time each policy is issued to the undersigned, such a sum as the Attorney shall deem proper, to be designated "Expense and Guarantee Fund," and to be held and disposed of as hereinafter provided.

4. In addition to such Expense and Guarantee Fund deposit, the undersigned will, upon the request of the Attorney, deposit with the Attorney the sum of ten dollars, to be designated "Reserve Fund." The amount of the Reserve Fund deposit of the undersigned may, at the option of the undersigned, be increased to a sum in excess of ten dollars, provided the total Reserve Fund deposit or deposits of the undersigned shall not at any one time exceed an average of two dollars for each full one thousand dollars of insurance carried by the undersigned hereunder. The Reserve Fund deposit or deposits of the undersigned shall be credited to the separate, individual account of the undersigned as a distinct item or items, under the designation, "Reserve Fund." Except as the amount of the Reserve Fund deposit or deposits of the undersigned may be reduced from time to time by the return to the undersigned of the excess thereof over and above the average of two dollars for each full one thousand dollars of insurance carried by the undersigned hereunder, the Reserve Fund deposit or deposits of the undersigned shall be maintained intact at all times. All of the Reserve Fund deposits aforesaid shall be held and disposed of as hereinafter provided.

5. The Attorney shall be allowed a sum equal to twenty per cent. of the total Expense and Guarantee Fund deposited or agreed to be deposited by the undersigned, and the Attorney is hereby authorized to deduct and retain such sum from any moneys received by the Attorney or the Advisory Committee (hereinafter mentioned) for the credit of the account of the undersigned, in consideration of which the Attorney shall pay all expenses of every kind in the execution of the power and authority hereby granted, except the payment of losses, expenses incident to the adjustment and settlement of losses (other than adjuster's fees and expenses), counsel fees, costs and expenses of litigation, taxes, legal expenses and assessments, license fees, expenses of fire patrol, fees and expenses of the Advisory Committee and expenses incident to the investment and custody of funds and securities.

6. Each Expense and Guarantee Fund deposit received from subscribers for a policy by the Attorney shall be divided into monthly amounts corresponding to that proportion of the deposit which the number of days expired on the policy in the month bears to the number of days in the term of the policy, and these amounts respectively, less such sums as may be due the Attorney and also due for losses and other expenses, shall be credited monthly to the Subscribers by carrying to the separate, individual account of each Subscriber, as a distinct and separate item under the designation, "Surplus,"

such a proportion thereof as the total Reserve Fund deposit or deposits of the particular Subscriber on the first day of the particular month bears to the total Reserve Fund deposits of all Subscribers. The proportion aforesaid of all losses and other expenses not otherwise provided for shall be paid from the Surplus thus credited to each Subscriber, and if such Surplus is insufficient then from the Surplus Reserve (hereinafter provided for) of each Subscriber, and if such Surplus Reserve is insufficient, then from the Reserve Fund deposit or deposits of each Subscriber.

7. In case the Reserve Fund deposit or deposits of the undersigned shall be reduced or encroached upon, the amount of such reduction or encroachment shall be immediately restored by the undersigned by the deposit of such amount with the Attorney; and the Attorney is hereby authorized and empowered to enforce such deposit by suit brought in the name of the Attorney, or otherwise.

8. The liability of the undersigned under any policy of insurance issued by virtue hereof, shall be only such proportionate share of the insurance granted by such policy as the total of the Reserve Fund deposit of the undersigned, deposited or agreed to be deposited, shall bear to the total of the Reserve Fund deposit of all Subscribers, deposited or agreed to be deposited; and it is understood and agreed that by the execution and delivery of this power of attorney the undersigned will assume the same proportionate liability on all policies issued to other Subscribers in force at the date hereof. No policy of insurance shall be issued by which the liability of the undersigned on any one risk shall exceed five times the amount of the Reserve Fund deposit of the undersigned, deposited or agreed to be deposited, except where a risk is so divided that in ordinary underwriting it would not be understood as subject to loss from one cause.

9. A fund, to be designated "Surplus Reserve," shall be created by crediting, at the end of each calendar year, to a separate account, twenty per cent. of the Surplus of the undersigned at that time, until such Surplus Reserve shall equal five times the Reserve Fund deposits of the undersigned. The remainder of the Surplus of the undersigned shall be paid to the undersigned annually as soon as may be after the end of each calendar year. If the Surplus Reserve of the undersigned shall be reduced or encroached upon, the amount of such reduction or encroachment shall be made good in the manner provided in this paragraph for the creation of the Surplus Reserve.

10. For the purpose of protecting the rights of all parties in interest, there shall be an Advisory Committee consisting of five members and the president of the Attorney, who shall be, ex-officio, a member and act as Secretary of this Committee. All members of this Committee, except the Secretary, shall be individual Subscribers or members of firms or officers of corporations which are Subscribers, and shall be elected annually. On the first day of December in each year, or within five days thereafter, the Attorney shall send to each of the Subscribers a written notice to nominate and vote for members of the Advisory Committee. Those persons qualified to act, to the number of members to be elected, who shall have the highest number of votes, received by the Attorney up to twelve o'clock noon on the twentieth day of December, shall be elected members of the Advisory Committee to serve for one year and until their successors are elected and qualified. In this election, each of the Subscribers shall have as many votes as such Subscriber has dollars of Reserve Fund deposit, on the first day of December.

The Advisory Committee shall have power to adopt such rules and regulations, not inconsistent herewith, as they shall deem proper for calling and holding their meetings, and for carrying into effect the terms and provisions hereof. Any three members of said Committee shall constitute a quorum thereof. In case any one of the elected members of the Advisory Committee, or his firm or corporation, shall for any reason cease to be one of the Subscribers, he shall thereupon cease to be a member of the Advisory Committee, and in case of a vacancy in said Committee, from any cause, the remaining members shall have power to fill such vacancy.

The Advisory Committee shall take into their own charge and keeping all moneys or securities received by the Attorney on account of the Subscribers, less such sums as the Attorney is authorized to deduct, and shall have full discretion in regard to the investment and safekeeping of such moneys and securities. The Advisory Committee shall pay out of any funds on hand, from time to time, all losses adjusted and settled by the Attorney, and all other expenses not herein provided to be paid by the Attorney. Disbursements shall be by voucher check approved by the Attorney and signed by at least two members of the Advisory Committee, to be designated for that purpose by a majority of the Committee.

11. The Attorney shall furnish to the undersigned a complete list of all Subscribers and shall quarterly advise the undersigned of any and all changes that may take place in the list of Subscribers.

12. By and with the consent and approval of a majority of the Advisory Committee, the Attorney may transfer its office or the Warner Inter-Insurance Bureau to any other place or places in the United States, and at such other place or places exercise all the powers and duties herein provided for.

13. This Power of Attorney may be terminated at any time by either the undersigned or the Attorney, upon either giving to the other five days' notice in writing. At the expiration of said five days the undersigned shall cease to be one of the Subscribers, and all policies issued to the undersigned shall then cease and terminate without further notice or action on the part of the Attorney, and without regard

8. The liability of the undersigned under any policy of insurance issued by virtue hereof, shall be only such proportionate share of the insurance granted by such policy as the total of the Reserve Fund deposit of the undersigned, deposited or agreed to be deposited, shall bear to the total of the Reserve Fund deposit of all Subscribers, deposited or agreed to be deposited; and it is understood and agreed that by the execution and delivery of this power of attorney the undersigned will assume the same proportionate liability on all policies issued to other Subscribers in force at the date hereof. No policy of insurance shall be issued by which the liability of the undersigned on any one risk shall exceed five times the amount of the Reserve Fund deposit of the undersigned, deposited or agreed to be deposited; except where a risk is so divided that in ordinary underwriting it would not be understood as subject to loss from one cause.

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11. The Attorney shall furnish to the undersigned a complete list of all Subscribers and shall quarterly advise the undersigned of any and all changes that may take place in the list of Subscribers.

12. By and with the consent and approval of a majority of the Advisory Committee, the Attorney may transfer its office or the Warner Inter-Insurance Bureau to any other place or places in the United States, and at such other place or places exercise all the powers and duties herein provided for.

13. This Power of Attorney may be terminated at any time by either the undersigned or the Attorney, upon either giving to the other five days' notice in writing. At the expiration of said five days the undersigned shall cease to be one of the Subscribers, and all policies issued to the undersigned shall then cease and terminate without further notice or action on the part of the Attorney, and without regard to whether or not any balance that may be due the undersigned upon account, is then paid. The Attorney, in the event of the termination hereof, shall, within sixty (60) days thereafter, make up the account of the undersigned, and any sum or sums of money found to be due to the undersigned shall thereupon be returned to the undersigned by the Advisory Committee.

WITNESS the execution hereof, this.....day of....., 19...

(Sign here .....

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If a corporation, this Power of Attorney should be signed by the President or Vice-President, attested by the Secretary or other proper officer and seal attached.

Policy

PLAINTIFF S' EXHIBIT 7 S

WARNER RECIPROCAL INSURERS

being the individuals, partnerships and corporations (including the insured hereunder hereinafter for convenience called "Insurers," exchanging from time to time insurance between themselves in accordance with the provisions of a printed form of instrument denominated "Warne Reciprocal Insurers Appointment of Agent" which is hereby made a part hereof and hereinafter for convenience called "Appointment of Agent," each Insurer having previously executed a several, separate and individual copy of the Appointment of Agent as Principal therein in favor of and delivered to Lansing B. Warner, Incorporated, a corporation of the State of Illinois, U. S. A., as Agent therein, hereinafter for convenience called "Agent,"

In Consideration of the Stipulations Herein Named and of the exchange of insurance between Insurers, do severally insure

for the term of months

from the day of 19 , at noon,

to the day of 19 , at noon,

against all direct loss or damage by fire, except as hereinafter provided, to the several amounts ascertained and determined as hereinafter provided, in the aggregate not exceeding

Dollars,

to the following described property while located and contained as described herein, and not elsewhere, to-wit:

SAMPLE

to the day of 19 , at noon,

against all direct loss or damage by fire, except as hereinafter provided, to the several amounts ascertained and determined as hereinafter provided, in the aggregate not exceeding

Dollars,

to the following described property while located and contained as described herein, and not elsewhere, to-wit:

SAMPLE

It is expressly made a condition of this policy that no one of the Insurers will be liable jointly with any other or others of the Insurers for the whole or any part of any aggregate liability arising hereunder, nor will any one of the Insurers be liable severally for the whole of such aggregate liability, but each one of the Insurers will be liable severally, separately and individually for a particular part or proportion of the aggregate liability arising hereunder in any month during the term hereof, the part or proportion of each Insurer to be ascertained and determined, in accordance with the provisions of the Appointment of Agent, by the application of such provisions to such Insurer as Principal therein.

This policy is made and accepted subject to the foregoing stipulations and conditions, and to the stipulations and conditions printed on the back hereof, which are hereby specially referred to and made a part of this policy, together with such other provisions, stipulations and conditions as may be endorsed hereon or added hereto, and no one in behalf of the Insurers or any of them or in behalf of the Agent shall have power to waive any provision or condition of this policy or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written hereon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

IN WITNESS WHEREOF each of the Insurers has caused the execution and attestation of these presents by the use of the designation Warner Reciprocal Insurers by Lansing B. Warner, Incorporated, Agent.

Executed and delivered at Chicago, Illinois, this day of 19

WARNER RECIPROCAL INSURERS

By LANSING B. WARNER, INCORPORATED
Agent

COPYRIGHT 1925
BY
LANSING B. WARNER, INCORPORATED

By [redacted]

STIPULATIONS AND CONDITIONS MADE A PART OF TH

The Insurers shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which each Insurer is liable pursu estimate, and satisfactory proof of the loss have been received by the Agent in accordance with the terms of this policy: It shall be optional, however, with the Agent for t tained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving intention so to do; but there can be no abandonment to the Insurers or the Agent for their benefit of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if, mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee-simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above describ premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

The Insurers shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

The Insurers shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, explosives, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no one, other than the Agent, shall be deemed the representative or agent of any of the Insurers unless duly authorized in writing by the Agent.

This policy may be continued under the original stipulations by a renewal made by the Agent acting for the Insurers, provided that any increase of hazard must be made known to the Agent at the time of renewal or this policy shall be void.

This policy may be canceled either by the insured or by the Agent, notice thereof to be given and the cancellation to become effective as follows: In case the cancellation is made by the insured notice thereof shall be given to the Agent and the cancellation shall become effective at the time the notice is received by the Agent, or if specified in the notice, on the date of the sending of the notice or some fixed date thereafter. In case the cancellation is made by the Agent notice thereof shall be given to the

If property covered by this policy is so en that part of this policy in excess of its proportio for the ensuing five days only, cover the prop excess of this policy shall cover therein for su to the value in all such new locations; but t be liable beyond the proportion that the amo time of fire, whether the same cover in new

If fire occur the insured shall give immed from further damage, forthwith separate the make a complete inventory of the same, stat within sixty days after the fire, unless such t signed and sworn to by said insured, stating the interest of the insured and of all others in all incumbrances thereon; all other insurance, tions and schedules of all policies; any change since the issuing of this policy; by whom and occupied at the time of fire; and shall fur machinery destroyed or damaged; and shall al ested in the claim as a creditor or otherwise examined the circumstances and believes the public shall satisfy.

The insured, as often as required, shall ex herein described, and submit to examinations as often as required, shall produce for examin thereof if originals be lost, at such reasona permit extracts and copies thereof to be ma

In the event of disagreement as to the am and disinterested appraisers, the insured and and disinterested umpire; the appraisers toget damage, and, failing to agree, shall submit, th the amount of such loss; the parties thereto expenses of the appraisal and umpire.

The Insurers shall not be held to have wa quirement, act, or proceeding on their part shall not become payable until sixty days a required have been received by the Agent, i

The Insurers shall not be liable under th loss by and expense of removal from premis insurance, whether valid or not, or by solven of the insurance under this policy or of the agreement or condition written hereon or att hereon.

If the Agent shall claim that the fire wa cipal, the Agent for the benefit of the Insurers right of recovery by the insured for the loss for the benefit of the Insurers on receiving s

No suit or action on this policy for the re

SAMPLE

sured now has or shall hereafter make or procure any other contract [illegible]
in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee-simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

The Insurers shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

The Insurers shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no one, other than the Agent, shall be deemed the representative or agent of any of the Insurers unless duly authorized in writing by the Agent.

This policy may be continued under the original stipulations by a renewal made by the Agent acting for the Insurers, provided that any increase of hazard must be made known to the Agent at the time of renewal or this policy shall be void.

This policy may be canceled either by the insured or by the Agent, notice thereof to be given and the cancellation to become effective as follows: In case the cancellation is made by the insured notice thereof shall be given to the Agent and the cancellation shall become effective at the time the notice is received by the Agent, or if specified in the notice, on the date of the sending of the notice or some fixed date thereafter. In case the cancellation is made by the Agent notice thereof shall be given to the insured and the cancellation shall become effective five days after the time the notice is received by the insured.

If, with the consent of the Agent, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the Insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

time of fire, whether the same cover [illegible]

If fire occur the insured shall give immediate notice of a from further damage, forthwith separate the damaged and u make a complete inventory of the same, stating the quantity within sixty days after the fire, unless such time is extended signed and sworn to by said insured, stating the knowledge the interest of the insured and of all others in the property; th all incumbrances thereon; all other insurance, whether valid or tions and schedules of all policies; any changes in the title, u since the issuing of this policy; by whom and for what purpos occupied at the time of fire; and shall furnish, if require machinery destroyed or damaged; and shall also, if required, ested in the claim as a creditor or otherwise, nor related to examined the circumstances and believes the insured has hone public magistrate.

The insured, as often as required, shall exhibit to any pe herein described, and submit to examinations under oath by as often as required, shall produce for examination all books thereof if originals be lost, at such reasonable place as ma permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the and disinterested appraisers, the insured and the Agent each and disinterested umpire; the appraisers together shall then damage, and, failing to agree, shall submit their differences to the amount of such loss; the parties thereto shall pay the ap expenses of the appraisal and umpire.

The Insurers shall not be held to have waived any provisi quirement, act, or proceeding on their part relating to the a shall not become payable until sixty days after the notice, required have been received by the Agent, including an aw

The Insurers shall not be liable under this policy for a loss by and expense of removal from premises endangered b insurance, whether valid or not, or by solvent or insolvent of the insurance under this policy or of the contribution to agreement or condition written hereon or attached or appen hereon.

If the Agent shall claim that the fire was caused by th cipal, the Agent for the benefit of the Insurers shall, on payn right of recovery by the insured for the loss resulting there for the benefit of the Insurers on receiving such payment.

No suit or action on this policy, for the recovery of any full compliance by the insured with all the foregoing requirem

Wherever in this policy the word "insured" occurs, it sh wherever the word "loss" occurs, it shall be deemed the e

Wherever in this policy mention is made of any hour place where the property insured is located.

SAMPLE

l the interest of the insured in the property
ed touching any matter relating to this insurance or

hereon or added hereto, shall be void if the in-
nsurance, whether valid or not, on property covered
ufacturing establishment and it be operated in whole
more than ten consecutive days; or if the hazard be
or if mechanics be employed in building, altering or
one time; or if the interest of the insured be other
a building on ground not owned by the insured in
ecome incumbered by a chattel mortgage; or if, with
notice given of sale of any property covered by this
an by the death of an insured, take place in the in-
cupants without increase of hazard) whether by legal
his policy be assigned before a loss; or if illuminating
or use therein; or if (any usage or custom of trade or
ed on the above described premises, benzine, benzole,
nty-five pounds in quantity, naphtha, nitro-glycerine,
reater inflammability than kerosene oil of the United
ing to law but in quantities not exceeding five barrels,
ss than ten feet from artificial light); or if a building
or become vacant or unoccupied and so remain for

by invasion, insurrection, riot, civil war or commo-
by theft; or by neglect of the insured to use all rea-
hen the property is endangered by fire in neighboring
only) by explosion of any kind, or lightning; but liа-
ment hereon.
surance by this policy on such building or its contents

deeds, evidences of debt, money, notes, or securities;
bullion, casts, curiosities, drawings, dies, implements,
s, signs, store fixtures, furniture or fixtures, sculpture,
lue destroyed by fire, or loss occasioned by ordinance
of business, manufacturing processes, or otherwise; nor
ons than that which this policy shall bear to the whole

o if this policy it shall be a part of this contract and

shall be deemed the representative or agent of any of

renewal made by the Agent acting for the Insurers,
it at the time of renewal or this policy shall be void.
tice thereof to be given and the cancellation to become
e thereof shall be given to the Agent and the cancella-
t, or if specified in the notice; on the date of the send-
made by the Agent notice thereof shall be given to the
time the notice is received by the insured.
ll exist in favor of a mortgagee or of any person or
interest of the Insured as described herein, the condi-
provisions and conditions of insurance relating to such

for the ensuing five days only, cover the property so removed in the new location; if removed to more
excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears
to the value in all such new locations; but the Insurers shall not, in any case of removal, whether to one or more locations,
be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the
time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to the Agent, protect the property
from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order,
make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and,
within sixty days after the fire, unless such time is extended in writing by the Agent, shall render a statement to the Agent,
signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire;
the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon;
all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descrip-
tions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property
since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were
occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or
machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not inter-
ested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has
examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary
public shall certify.

The insured, as often as required, shall exhibit to any person designated by the Agent all that remains of any property
herein described, and submit to examinations under oath by any person named by the Agent, and subscribe the same; and,
as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies
thereof if originals be lost, at such reasonable place as may be designated by the Agent or its representative, and shall
permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent
and disinterested appraisers, the insured and the Agent each selecting one, and the two so chosen shall first select a competent
and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and
damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine
the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the
expenses of the appraisal and umpire.

The Insurers shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any re-
quirement, act, or proceeding on their part relating to the appraisal or to any examination herein provided for; and the loss
shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein
required have been received by the Agent, including an award by appraisers when appraisal has been required.

The Insurers shall not be liable under this policy for a greater proportion of any loss on the described property, or for
loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole
insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application
of the insurance under this policy or of the contribution to be made by the Insurers in case of loss, may be provided for by
agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed
hereon.

If the Agent shall claim that the fire was caused by the act or neglect of any person or corporation, private or muni-
cipal, the Agent for the benefit of the Insurers shall, on payment of the loss, be subrogated to the extent of such payment to all
right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned by the insured to the Agent
for the benefit of the Insurers on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after
full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and
wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

Wherever in this policy mention is made of any hour of the day or night, the same shall refer to standard time at the
place where the property insured is located.

SAMPLE

EFFECTIVE

EXPIRES

AMOUNT $

PROPERTY

PREVIOUS POLICY NO.

ISSUED FOR

WARNER RECIPROCAL INSURERS

BY

LANSING B. WARNER
INCORPORATED

AGENT

540 NORTH MICHIGAN AVENUE

CHICAGO

It is important that the written portions of all policies covering the same property read exactly alike; if they do not they should be made uniform at once.

Please Read your Policy and the conditions

PLAINTIFF'S EXHIBIT 8

Policy No. $

Warner Reciprocal Insurers

being the individuals, partnerships and corporations (including the insured hereunder) hereinafter for convenience called "Insurers," exchanging from time to time insurance between themselves in accordance with the provisions of a printed form of instrument denominated "Warner Reciprocal Insurers Appointment of Agent" which is hereby made a part hereof and hereinafter for convenience called "Appointment of Agent," each Insurer having previously executed a several, separate and individual copy of the Appointment of Agent as Principal therein in favor of and delivered to Lansing B. Warner, Incorporated, a corporation of the State of Illinois, U. S. A., as Agent therein, hereinafter for convenience called "Agent,"

IN CONSIDERATION OF THE STIPULATIONS HEREIN NAMED and of the exchange of insurance between Insurers, do insure _____

_____

and legal representatives, to the extent of the actual cash value (ascertained with proper deductions for depreciation) of the property at the time of loss or damage, but not exceeding the amount which it would cost to repair or replace the same with material of like kind and quality within a reasonable time after such loss or damage, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair and without compensation for loss resulting from interruption of business or manufacture, for the term of

_____

from the _____ day of _____ 19____, at noon,

to the _____ day of _____ 19____, at noon,

against all DIRECT LOSS AND DAMAGE BY FIRE and by removal from premises endangered by fire, except as herein provided, to an amount not exceeding _____ Dollars,

to the following described property while located and contained as described herein, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from fire, but not elsewhere, to wit:

It is expressly made a condition of this policy that no one of the Insurers will be liable jointly with any other or others of the Insurers for the whole or any part of any aggregate liability arising hereunder, nor will any one of the Insurers be liable severally for the whole of such aggregate liability, but each Insurer will be liable severally, separately and individually for a particular part or proportion of the aggregate liability arising hereunder, which

IN CONSIDERATION OF THE STIPULATIONS HEREIN NAMED and of the exchange of insurance between Insurers, do insure _____

_____

and legal representatives, to the extent of the actual cash value (ascertained with proper deductions for depreciation) of the property at the time of loss or damage, but not exceeding the amount which it would cost to repair or replace the same with material of like kind and quality within a reasonable time after such loss or damage, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair and without compensation for loss resulting from interruption of business or manufacture, for the term of

_____

from the _____ day of _____ 19____, at noon,

to the _____ day of _____ 19____, at noon,

against all DIRECT LOSS AND DAMAGE BY FIRE and by removal from premises endangered by fire, except as herein provided, to an amount not exceeding _____ Dollars,

to the following described property while located and contained as described herein, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from fire, but not elsewhere, to wit:

It is expressly made a condition of this policy that no one of the Insurers will be liable jointly with any other or others of the Insurers for the whole or any part of any aggregate liability arising hereunder, nor will any one of the Insurers be liable severally for the whole of such aggregate liability, but each Insurer will be liable severally, separately and individually for a particular part or proportion of the aggregate liability arising hereunder, which liability shall be in the proportion that the part of the Insurer's Guaranty Deposit assigned to any one month bears to the total Guaranty Deposits of all Insurers assigned to such month.

This policy is made and accepted subject to the foregoing stipulations and conditions, and to the stipulations and conditions printed on the back hereof, which are hereby made a part of this policy, together with such other provisions, stipulations and conditions as may be endorsed hereon or added hereto as herein provided.

IN WITNESS WHEREOF, each of the Insurers has caused the execution and attestation of these presents by the use of the designation Warner Reciprocal Insurers by Lansing B. Warner, Incorporated, Agent.

Executed and delivered at Chicago, Illinois, this _____ day of _____ 19____

WARNER RECIPROCAL INSURERS

By LANSING B. WARNER, Incorporated
Agent

Countersigned

this _____ day of _____ 19____ *By* _____

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Fraud, misrepresentation, etc. This entire policy shall be void if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

Uninsurable and Excepted property. This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money, notes or securities; nor, unless specifically named hereon in writing, bullion, manuscripts, mechanical drawings, dies or patterns.

Hazards not covered. The Insurers shall not be liable for loss or damage caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises.

This entire policy shall be void, unless otherwise provided by agreement in writing added hereto,

Ownership, etc. (a) if the interest of the insured be other than unconditional and sole ownership; or (b) if the subject of insurance be a building on ground not owned by the insured in fee simple; or (c) if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property insured hereunder by reason of any mortgage or trust deed; or (d) if any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard); or (e) if this policy be assigned before a loss.

Unless otherwise provided by agreement in writing added hereto the Insurers shall not be liable for loss or damage occurring

Other insurance. (a) while the insured shall have any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or

Increase of hazard. (b) while the hazard is increased by any means within the control or knowledge of the insured; or

Repairs, etc. (c) while mechanics are employed in building, altering or repairing the described premises beyond a period of fifteen days; or

Explosives, gas, etc. (d) while illuminating gas or vapor is generated on the described premises; or while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises fireworks, greek fire, phosphorus, explosives, benzine, gasolene, naphtha or any other petroleum product of greater inflammability than kerosene oil, gunpowder exceeding twenty-five pounds, or kerosene oil exceeding five barrels; or

Factories. (e) if the subject of insurance be a manufacturing establishment while operated in whole or in part between the hours of ten P. M. and five A. M., or while it ceases to be operated beyond a period of ten days; or

Unoccupancy. (f) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of ten days; or

Explosion, Lightning. (g) by explosion or lightning, unless fire ensue, and, in that event, for loss or damage by fire only.

Chattel mortgage. Unless otherwise provided by agreement in writing added hereto the Insurers shall not be liable for loss or damage to any property insured hereunder while incumbered by a chattel mortgage, and during the time of such incumbrance the Insurers shall be liable only for loss or damage to any other property insured hereunder.

Fall of building. If a building, or any material part thereof, fall except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

Added Clauses. The extent of the application of insurance under this policy and of the contribution to be made by the Insurers in case of loss or damage, and any other agreement not inconsistent with or a waiver of any of the conditions or provisions of this policy, may be provided for by agreement in writing added hereto.

Pro rata liability. The Insurers shall not be liable for a greater proportion of any loss or damage than the amount hereby insured shall bear to the whole insurance covering the property, whether valid or not and whether collectible or not.

Noon. The word "noon" herein means noon of standard time at the place of loss or damage.

Mortgage interests. If loss or damage is made payable, in whole or in part, to a mortgagee not named herein as the insured, this policy may be cancelled as to such interest by giving to such mortgagee a ten days' written notice of cancellation. Upon failure of the insured to render proof of loss such mortgagee shall, as if named as insured hereunder, but within sixty days after notice of such failure, render proof of loss and shall be subject to the provisions hereof as to appraisal and times of payment and of bringing suit. On payment to such mortgagee of any sum for loss or damage hereunder, if the Insurers shall claim that as to the mortgagor or owner, no liability existed, they shall, to the extent of such payment be subrogated to the mortgagee's right of recovery and claim upon the collateral to the mortgage debt, but without impairing the mortgagee's right to sue; or they may pay the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

Requirements in case of loss. The insured shall give immediate notice, in writing, to the Insurers, of any loss or damage, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, stating the quantity and cost of each article and the amount claimed thereon; and, **the insured shall, within sixty days after the fire, unless such time is extended in writing by the Insurers, render to the Insurers a proof of loss,** signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof and the amount of loss or damage thereto, all incumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish a copy of all the descriptions and schedules in all policies and if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by the Insurers all that remains of any property herein described, and submit to examinations under oath by any person named by the Insurers, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by the Insurers or their representative, and shall permit extracts and copies thereof to be made.

Appraisal. In case the insured and the Insurers shall fail to agree as to the amount of loss or damage, each shall, on the written demand of either, select a competent and disinterested appraiser. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire then, on request of the insured or the Insurers, such umpire shall be selected by a judge of a court of record in the state in which the property insured is located. The appraisers shall then appraise the loss and damage, stating separately sound value and loss or damage to each item; and failing to agree, shall submit their differences only, to the umpire. An award in writing, so itemized, of any two when filed with the Insurers shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Insurers' It shall be optional with the Insurers to take all, or any part, of the articles at the

of agreement in writing added hereto,

Ownership, etc. (a) if the interest of the insured be other than unconditional and sole ownership; or (b) if the subject of insurance be a building on ground not owned by the insured in fee simple; or (c) if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property insured hereunder by reason of any mortgage or trust deed; or (d) if any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard); or (e) if this policy be assigned before a loss.

Unless otherwise provided by agreement in writing added hereto the Insurers shall not be liable for loss or damage occurring

Other insurance. (a) while the insured shall have any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or

Increase of hazard. (b) while the hazard is increased by any means within the control or knowledge of the insured; or

Repairs, etc. (c) while mechanics are employed in building, altering or repairing the described premises beyond a period of fifteen days; or

Explosives, gas, etc. (d) while illuminating gas or vapor is generated on the described premises; or while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises fireworks, greek fire, phosphorus, explosives, benzine, gasolene, naphtha or any other petroleum product of greater inflammability than kerosene oil, gunpowder exceeding twenty-five pounds, or kerosene oil exceeding five barrels; or

Factories. (e) if the subject of insurance be a manufacturing establishment while operated in whole or in part between the hours of ten P. M. and five A. M., or while it ceases to be operated beyond a period of ten days; or

Unoccupancy. (f) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of ten days; or

Explosion, Lightning. (g) by explosion or lightning, unless fire ensue, and, in that event, for loss or damage by fire only.

Chattel mortgage. Unless otherwise provided by agreement in writing added hereto the Insurers shall not be liable for loss or damage to any property insured hereunder while incumbered by a chattel mortgage, and during the time of such incumbrance the Insurers shall be liable only for loss or damage to any other property insured hereunder.

Fall of building. If a building, or any material part thereof, fall except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

Added Clauses. The extent of the application of insurance under this policy and of the contribution to be made by the Insurers in case of loss or damage, and any other agreement not inconsistent with or a waiver of any of the conditions or provisions of this policy, may be provided for by agreement in writing added hereto.

Waiver. No one shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement added hereto, nor shall any such provision or condition be held to be waived unless such waiver shall be in writing added hereto, nor shall any provision or condition of this policy or any forfeiture be held to be waived by any requirement, act or proceeding on the part of the Insurers relating to appraisal or to any examination herein provided for; nor shall any privilege or permission affecting the insurance hereunder exist or be claimed by the insured unless granted herein or by rider added hereto.

Cancellation of policy. This policy shall be cancelled at any time at the request of the insured, in which case the Insurers shall, upon demand and surrender of this policy, refund the excess of paid deposit above the customary short rates for the expired time. This policy may be cancelled at any time by the Insurers by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid deposit above the pro rata deposit for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess deposit (if not tendered) will be refunded on demand.

claim upon the collateral to the mortgage debt, but without impairing the mortgagee's right to sue; or they may pay the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

Requirements in case of loss. The insured shall give immediate notice, in writing, to the Insurers, of any loss or damage, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, stating the quantity and cost of each article and the amount claimed thereon; and, the insured shall, within sixty days after the fire, unless such time is extended in writing by the Insurers, render to the Insurers a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof and the amount of loss or damage thereto, all incumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire and shall furnish a copy of all the descriptions and schedules in all policies and if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by the Insurers all that remains of any property herein described, and submit to examinations under oath by any person named by the Insurers, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable time and place as may be designated by the Insurers or their representative, and shall permit extracts and copies thereof to be made.

Appraisal. In case the insured and the Insurers shall fail to agree as to the amount of loss or damage, each shall, on the written demand of either, select a competent and disinterested appraiser. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire then, on request of the insured or the Insurers, such umpire shall be selected by a judge of a court of record in the state in which the property insured is located. The appraisers shall then appraise the loss and damage stating separately sound value and loss or damage to each item; and failing to agree, shall submit their differences only, to the umpire. An award in writing, so itemized, of any two when filed with the Insurers shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Insurers' options. It shall be optional with the Insurers to take all, or any part, of the articles at the agreed or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required; but there can be no abandonment to the Insurers of any property.

Abandonment.

When loss payable. The amount of loss or damage for which the Insurers may be liable shall be payable sixty days after proof of loss, as herein provided, is received by the Insurers and ascertainment of the loss or damage is made either by agreement between the insured and the Insurers expressed in writing or by the filing with the Insurers of an award as herein provided.

Suit. No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, nor unless commenced within twelve months next after the fire.

Subrogation. The Insurers may require from the insured an assignment of all right of recovery against any party for loss or damage to the extent that payment therefor is made by the Insurers.

EFFECTIVE

EXPIRES

PROPERTY

AMOUNT $

No.

PREVIOUS POLICY NO.

ISSUED FOR

Warner Reciprocal Insurers

BY

LANSING B. WARNER

INCORPORATED

AGENT

540 NORTH MICHIGAN AVENUE

CHICAGO

It is important that the written portions of all policies covering the same property read exactly alike; if they do not they should be made uniform at once.

Please Read your Policy and the conditions

PLAINTIFFS' EXHIBIT 9

$

CANNERS EXCHANGE SUBSCRIBERS AT WARNER INTER-INSURANCE BUREAU

(ACTING THROUGH LANSING B. WARNER, INCORPORATED, OF CHICAGO, ILLINOIS, AS THEIR ATTORNEY IN FACT, HEREINAFTER CALLED THE ATTORNEY)

In Consideration of the Stipulations Herein Named and of the exchange of indemnity among Subscribers, as provided in a Power of Attorney given by each of the Subscribers to Lansing B. Warner, Incorporated, do insure

for the term of

from the day of 19 , at noon,

to the day of 19 , at noon,

against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Dollars,

to the following described property while located and contained as described herein, and not elsewhere, to wit:

SAMPLE

from the day of 19 , at noon,

to the day of 19 , at noon,

against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Dollars,

to the following described property while located and contained as described herein, and not elsewhere, to wit:

SAMPLE

This policy is made and accepted under the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this policy, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and the Subscribers or Attorney shall not be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written hereon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

Canners Exchange Subscribers at Warner Inter-Insurance Bureau, herein also called the Subscribers, are persons, firms and corporations that have each executed a Power of Attorney (hereby made a part hereof) which vests in Lansing B. Warner, Incorporated, herein called the Attorney, the power to underwrite and issue this policy for them. It is understood and agreed that the Subscribers are not jointly liable hereunder with other Subscribers or any of them, and that there is assumed by each Subscriber only a several, individual liability for such proportionate share of the insurance granted hereunder as is provided in said Power of Attorney.

WITNESS, the execution hereof this day of

19 at Chicago, Illinois.

CANNERS EXCHANGE SUBSCRIBERS
AT WARNER INTER-INSURANCE BUREAU

By LANSING B. WARNER, Incorporated,
Attorney

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By [redacted]

STIPULATIONS AND CONDITIONS FORMING PART OF THIS POLICY.

The Subscribers shall not be liable in the aggregate beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estima with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said as the insured and the Attorney, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which the Subscribers are li able sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by the Attorney in accordance with the terms of this policy. It shall be optional, howe their Attorney to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality w within thirty days after the receipt of the proof herein required, of the intention so to do; but there can be no abandonment to the Subscribers of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering, or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard, (which last may be used for lights and kept for sale according to law but in quantities not exceeding five gallons, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

The Subscribers shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

The Subscribers shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described. If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured. In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of the Subscribers.

This policy may by a renewal be continued under the original stipulations, provided that any increase of hazard must be made known to the Attorney at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the Attorney, by giving five days notice of such cancellation. If this policy shall be canceled, as hereinbefore provided, or become void or cease, and the Expense and Guarantee Fund in connection herewith shall have been actually deposited, in accordance with the terms of the power of attorney referred to herein and made a part hereof, there shall be returned to the insured, on surrender of this policy or last renewal, the remainder of said deposit, after deducting an amount equal to that which would be charged for this policy by insurance companies, at short rates, for the expired portion of the term hereof, except that when this policy is canceled by the act of the Attorney, the amount returned to the insured on surrender of this policy or last renewal, shall be that proportion of the remainder of said deposit, after deducting the allowances and expenses provided for in said power of attorney, which the unexpired portion of the term hereof bears to the expired portion of such term.

If, with the consent of the Subscribers acting through their Attorney, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require rem that part of this policy in excess of its proportion of any loss and of the value of pro for the ensuing five days only, cover the property so removed in the new location excess of this policy shall cover therein for such five days in the proportion that t to the value in all such new locations; but the Subscribers shall not, in any case of liable in the aggregate beyond the proportion that the amount hereby insured shall bear the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in w from further damage, forthwith separate the damaged and undamaged personal make a complete inventory of the same, stating the quantity and cost of each ar within sixty days after the fire, unless such time is extended in writing by the Attorn signed and sworn to by said insured, stating the knowledge and belief of the in the interest of the insured and of all others in the property; the cash value of each all incumbrances thereon; all other insurance, whether valid or not, covering any of it and schedules in all policies; any changes in the title, use, occupation, locati the issuing of this policy; by whom and for what purpose any building herein occupied at the time of fire; and shall furnish, if required, verified plans and machinery destroyed or damaged; and shall also, if required, furnish a certificate o ested in the claim as a creditor or otherwise, nor related to the insured) living examined the circumstances and believes the insured has honestly sustained loss to public shall certify.

The insured, as often as required, shall exhibit to any person designated by herein described, and submit to examinations under oath by any person named by as often as required, shall produce for examination all books of account, bills, inv thereof if originals be lost, at such reasonable place as may be designated by t permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as abov and disinterested appraisers, the insured and the Attorney each selecting one, and t and disinterested umpire; the appraisers together shall then estimate and appraise damage, and, failing to agree, shall submit their differences to the umpire, and the the amount of such loss; the parties thereto shall pay the appraiser respectively expenses of the appraisal and umpire.

The Subscribers shall not be held to have waived any provision or condition requirement, act, or proceeding on the part of the Attorney relating to the appraisal or t loss shall not become payable until sixty days after the notice, ascertainment, estim required have been received by the Attorney, including an award by appraisers whe

The Subscribers shall not be liable in the aggregate under this policy for a greate erty, or for loss by and expense of removal from premises endangered by fire, than the insurance, whether valid or not, or by solvent or insolvent insurers, covering such of the insurance under this policy or of the contribution to be made by the Subscr agreement or condition written hereon or attached or appended hereto. Liability f hereon.

If the Attorney shall claim that the fire was caused by the act or neglect of cipal, the Attorney as the representative of the Subscribers shall, on payment of the los to all right of recovery by the insured for the loss resulting therefrom, and such r representative of the Subscribers by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustai full compliance by the insured with all the foregoing requirements, nor unless comme

Wherever in this policy the word "insured" occurs, it shall be held to include th ever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

Wherever in this policy mention is made of any hour of the day or night, the same shall refer to standard time at the place where the property insured is located.

SAMPLE

STIPULATIONS AND CONDITIONS FORMING PART OF THIS POLICY.

t be liable in the aggregate beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, 1
ciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by 2
r, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which the Subscribers are liable pursuant to this policy shall be pay- 3
ascertainment, estimate, and satisfactory proof of the loss have been received by the Attorney in accordance with the terms of this policy. It shall be optional, however, with the Subscribers acting through 4
y part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, 5
ipt of the proof herein required, of the intention so to do; but there can be no abandonment to the Subscribers of the property described. 6

void if the insured has concealed or misrepresented, in writing or otherwise, any material
s insurance or the subject thereof; or if the interest of the insured in the property be not
ny fraud or false swearing by the insured touching any matter relating to this insurance or
or after a loss.
herwise provided by agreement indorsed hereon or added hereto, shall be void if the in-
ake or procure any other contract of insurance, whether valid or not, on property covered
or if the subject of insurance be a manufacturing establishment and it be operated in whole
o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be
control or knowledge of the insured; or if mechanics be employed in building, altering, or
ises for more than fifteen days at any one time; or if the interest of the insured be other
ship; or if the subject of insurance be a building on ground not owned by the insured in
rance be personal property and be or become incumbered by a chattel mortgage; or if, with
closure proceedings be commenced or notice given of sale of any property covered by this
r trust deed; or if any change, other than by the death of an insured, take place in the in-
bject of insurance (except change of occupants without increase of hazard) whether by legal
act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating
scribed building (or adjacent thereto) for use therein; or if (any usage or custom of trade or
hstanding) there be kept, used, or allowed on the above described premises, benzine, benzole,
, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine,
petroleum or any of its products of greater inflammability than kerosene oil of the United
used for lights and kept for sale according to law but in quantities not exceeding five gallons
l by daylight or at a distance not less than ten feet from artificial light); or if a building described
upancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.
liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commo-
or by order of any civil authority; or by theft; or by neglect of the insured to use all rea-
the property at and after a fire or when the property is endangered by fire in a neighboring
d, in that event; for the damage by fire only) by explosion of any kind or lightning; but
ning may be assumed by specific agreement hereon.
reof fall except as the result of fire, all insurance by this policy on such building or its contents

liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities;
assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements,
, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture,
r for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance
pair of buildings, or by interruption of business, manufacturing processes or otherwise; nor
lue of plate glass, frescoes, and decorations than that which this policy shall bear to the whole
If an application, survey, plan, or description of property be referred to in this policy it shall be
y by the insured. In any matter relating to this insurance no person, unless duly authorized in
of the Subscribers.
be continued under the original stipulations, provided that any increase of hazard must be made
e of renewal or this policy shall be void.
any time at the request of the insured; or by the Attorney, by giving five days notice of such can-
led, as hereinbefore provided, or become void or cease, and the Expense and Guarantee Fund in
actually deposited, in accordance with the terms of the power of attorney referred to herein and
turned to the insured, on surrender of this policy or last renewal, the remainder of said deposit,
hat which would be charged for this policy by insurance companies, at short rates, for the expired
t when this policy is canceled by the act of the Attorney, the amount returned to the insured on
al, shall be that proportion of the remainder of said deposit, after deducting the allowances and
attorney, which the unexpired portion of the term hereof bears to the expired portion of such term.
scribers acting through their Attorney, an interest under this policy shall exist in favor of a mort-
having an interest in the subject of insurance other than the interest of the insured as described
ntained shall apply in the manner expressed in such provisions and conditions of insurance relating
pon, attached or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, 60
that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, 61
for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such 62
excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears 63
to the value in all such new locations; but the Subscribers shall not, in any case of removal, whether to one or more locations, be 64
liable in the aggregate beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at 65
the time of fire, whether the same cover in new location or not. 66

If fire occur the insured shall give immediate notice of any loss thereby in writing to the Attorney, protect the property 67
from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, 68
make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, 69
within sixty days after the fire, unless such time is extended in writing by the Attorney, shall render a statement to the Attorney, 70
signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; 71
the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; 72
all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descrip- 73
tions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property 74
since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were 75
occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or 76
machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not inter- 77
ested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has 78
examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary 79
public shall certify. 80

The insured, as often as required, shall exhibit to any person designated by the Attorney all that remains of any property 81
herein described, and submit to examinations under oath by any person named by the Attorney and subscribe the same; and, 82
as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies 83
thereof if originals be lost, at such reasonable place as may be designated by the Attorney or its representative, and shall 84
permit extracts and copies thereof to be made. 85

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent 86
and disinterested appraisers, the insured and the Attorney each selecting one, and the two so chosen shall first select a competent 87
and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and 88
damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine 89
the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the 90
expenses of the appraisal and umpire. 91

The Subscribers shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any 92
requirement, act, or proceeding on the part of the Attorney relating to the appraisal or to any examination herein provided for; and the 93
loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein 94
required have been received by the Attorney, including an award by appraisers when appraisal has been required. 95

The Subscribers shall not be liable in the aggregate under this policy for a greater proportion of any loss on the described prop- 96
erty, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole 97
insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application 98
of the insurance under this policy or of the contribution to be made by the Subscribers in case of loss, may be provided for by 99
agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed 100
hereon. 101

If the Attorney shall claim that the fire was caused by the act or neglect of any person or corporation, private or muni- 102
cipal, the Attorney as the representative of the Subscribers shall, on payment of the loss, be subrogated to the extent of such payment 103
to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to the Attorney as the 104
representative of the Subscribers by the insured on receiving such payment. 105

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after 106
full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire. 107

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wher- 108
ever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage." 109

SAMPLE

Wherever in this policy mention is made of any hour of the day or night, the same shall refer to standard time at the place where the property insured is located.

EFFECTIVE

EXPIRES

AMOUNT $

E. & G. F. DEP. $

PROPERTY

PREVIOUS POLICY NO.

ISSUED BY

CANNERS EXCHANGE SUBSCRIBERS

AT

WARNER INTER-INSURANCE BUREAU

LANSING B. WARNER, Incorporated

ATTORNEY

840 NORTH MICHIGAN AVENUE

CHICAGO

It is important that the written portions of all policies covering the same property read exactly alike; if they do not they should be made uniform at once.

237

Please Read your Policy and the conditions

PLAINTIFF'S EXHIBIT 10

Policy No. $

Canners Exchange Subscribers

AT

WARNER INTER-INSURANCE BUREAU

being the individuals, partnerships and corporations (including the insured hereunder) hereinafter for convenience called "Subscribers" exchanging from time to time insurance between themselves in accordance with the provisions of a printed form of instrument denominated "Canners Exchange Subscribers at Warner Inter-Insurance Bureau Power of Attorney" which is hereby made a part hereof and hereinafter for convenience called "Power of Attorney," each Subscriber having previously executed a several, separate and individual copy of the Power of Attorney as Principal therein in favor of and delivered to Lansing B. Warner, Incorporated, a corporation of the State of Illinois, U. S. A., as Attorney-in-Fact therein, hereinafter for convenience called "Attorney,"

IN CONSIDERATION OF THE STIPULATIONS HEREIN NAMED and of the exchange of insurance between Subscribers, do insure _____

_____

and legal representatives, to the extent of the actual cash value (ascertained with proper deductions for depreciation) of the property at the time of loss or damage, but not exceeding the amount which it would cost to repair or replace the same with material of like kind and quality within a reasonable time after such loss or damage, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair and without compensation for loss resulting from interruption of business or manufacture, for the term of

_____

from the _____ day of _____ 19____, at noon,

to the _____ day of _____ 19____, at noon,

against all DIRECT LOSS AND DAMAGE BY FIRE and by removal from premises endangered by fire, except as herein provided, to an amount not exceeding _____ Dollars,

to the following described property while located and contained as described herein, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from fire, but not elsewhere, to wit:

or repair and without compensation for loss resulting from interruption of business or manufacture, for the term of

_____

from the _____ day of _____ 19____, at noon,

to the _____ day of _____ 19____, at noon,

against all DIRECT LOSS AND DAMAGE BY FIRE and by removal from premises endangered by fire, except as herein provided, to an amount not exceeding _____ Dollars, to the following described property while located and contained as described herein, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from fire, but not elsewhere, to wit:

It is expressly made a condition of this policy that no one of the Subscribers will be liable jointly with any other or others of the Subscribers for the whole or any part of any aggregate liability arising hereunder, nor will any one of the Subscribers be liable severally for the whole of such aggregate liability, but each Subscriber will be liable severally, separately and individually for a particular part or proportion of the aggregate liability arising hereunder, which liability shall be in the proportion that the Subscriber's Reserve Fund deposit bears to the total of the Reserve Fund deposit of all Subscribers.

This policy is made and accepted subject to the foregoing stipulations and conditions, and to the stipulations and conditions printed on the back hereof, which are hereby made a part of this policy, together with such other provisions, stipulations and conditions as may be endorsed hereon or added hereto as herein provided.

IN WITNESS WHEREOF, each of the Subscribers has caused the execution and attestation of these presents by the use of the designation Canners Exchange Subscribers at Warner Inter-Insurance Bureau by Lansing B. Warner, Incorporated, Attorney.

Executed and delivered at Chicago, Illinois, this _____ day of _____ 19____

CANNERS EXCHANGE SUBSCRIBERS
at Warner Inter-Insurance Bureau

By LANSING B. WARNER, Incorporated
Attorney

Countersigned

this ____ day of _____ 19____ *By* _____

Fraud, misrepresentation, etc. This entire policy shall be void if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

Uninsurable and Excepted property. This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money, notes or securities; nor, unless specifically named hereon in writing, bullion, manuscripts, mechanical drawings, dies or patterns.

Hazards not covered. The Subscribers shall not be liable for loss or damage caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises.

This entire policy shall be void, unless otherwise provided by agreement in writing added hereto,

Ownership, etc. (a) if the interest of the insured be other than unconditional and sole ownership; or (b) if the subject of insurance be a building on ground not owned by the insured in fee simple; or (c) if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property insured hereunder by reason of any mortgage or trust deed; or (d) if any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard); or (e) if this policy be assigned before a loss.

Unless otherwise provided by agreement in writing added hereto the Subscribers shall not be liable for loss or damage occurring

Other insurance. (a) while the insured shall have any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or

Increase of hazard. (b) while the hazard is increased by any means within the control or knowledge of the insured; or

Repairs, etc. (c) while mechanics are employed in building, altering or repairing the described premises beyond a period of fifteen days; or

Explosives, gas, etc. (d) while illuminating gas or vapor is generated on the described premises; or while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises fireworks, greek fire, phosphorus, explosives, benzine, gasolene, naphtha or any other petroleum product of greater inflammability than kerosene oil, gunpowder exceeding twenty-five pounds, or kerosene oil exceeding five barrels; or

Factories. (e) if the subject of insurance be a manufacturing establishment while operated in whole or in part between the hours of ten P. M. and five A. M., or while it ceases to be operated beyond a period of ten days; or

Unoccupancy. (f) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of ten days; or

Explosion, Lightning. (g) by explosion or lightning, unless fire ensue, and, in that event, for loss or damage by fire only.

Chattel mortgage. Unless otherwise provided by agreement in writing added hereto the Subscribers shall not be liable for loss or damage to any property insured hereunder while incumbered by a chattel mortgage, and during the time of such incumbrance the Subscribers shall be liable only for loss or damage to any other property insured hereunder.

Fall of building. If a building, or any material part thereof, fall except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

Added Clauses. The extent of the application of insurance under this policy and of the contribution to be made by the Subscribers in case of loss or damage, and any

Pro rata liability. The Subscribers shall not be liable for a greater proportion of any loss or damage than the amount hereby insured shall bear to the whole insurance covering the property, whether valid or not and whether collectible or not.

Noon. The word "noon" herein means noon of standard time at the place of loss or damage.

Mortgage interests. If loss or damage is made payable, in whole or in part, to a mortgagee not named herein as the insured, this policy may be cancelled as to such interest by giving to such mortgagee a ten days written notice of cancellation. Upon failure of the insured to render proof of loss such mortgagee shall, as if named as insured hereunder, but within sixty days after notice of such failure, render proof of loss and shall be subject to the provisions hereof as to appraisal and times of payment and of bringing suit. On payment to such mortgagee of any sum for loss or damage hereunder, if the Subscribers shall claim that as to the mortgagor or owner, no liability existed, they shall, to the extent of such payment be subrogated to the mortgagee's right of recovery and claim upon the collateral to the mortgage debt, but without impairing the mortgagee's right to sue; or they may pay the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

Requirements in case of loss. The insured shall give immediate notice, in writing, to the Subscribers, of any loss or damage, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, stating the quantity and cost of each article and the amount claimed thereon; and, **the insured shall, within sixty days after the fire, unless such time is extended in writing by the Subscribers, render to the Subscribers a proof of loss,** signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof and the amount of loss or damage thereto, all incumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish a copy of all the descriptions and schedules in all policies and if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by the Subscribers all that remains of any property herein described, and submit to examinations under oath by any person named by the Subscribers, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by the Subscribers or their representative, and shall permit extracts and copies thereof to be made.

Appraisal. In case the insured and the Subscribers shall fail to agree as to the amount of loss or damage, each shall, on the written demand of either, select a competent and disinterested appraiser. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire then, on request of the insured or the Subscribers, such umpire shall be selected by a judge of a court of record in the state in which the property insured is located. The appraisers shall then appraise the loss and damage, stating separately sound value and loss or damage to each item; and failing to agree, shall submit their differences only, to the umpire. An award in writing, so itemized, of any two when filed with the Subscribers shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid

by agreement in writing added hereto,

Ownership, etc. (a) if the interest of the insured be other than unconditional and sole ownership; or (b) if the subject of insurance be a building on ground not owned by the insured in fee simple; or (c) if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property insured hereunder by reason of any mortgage or trust deed; or (d) if any change, other than by the death of an insured, take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard); or (e) if this policy be assigned before a loss.

Unless otherwise provided by agreement in writing added hereto the Subscribers shall not be liable for loss or damage occurring

Other insurance. (a) while the insured shall have any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or

Increase of hazard. (b) while the hazard is increased by any means within the control or knowledge of the insured; or

Repairs, etc. (c) while mechanics are employed in building, altering or repairing the described premises beyond a period of fifteen days; or

Explosives, gas, etc. (d) while illuminating gas or vapor is generated on the described premises; or while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises fireworks, greek fire, phosphorus, explosives, benzine, gasolene, naphtha or any other petroleum product of greater inflammability than kerosene oil, gunpowder exceeding twenty-five pounds, or kerosene oil exceeding five barrels; or

Factories. (e) if the subject of insurance be a manufacturing establishment while operated in whole or in part between the hours of ten P. M. and five A. M., or while it ceases to be operated beyond a period of ten days; or

Unoccupancy. (f) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of ten days; or

Explosion, Lightning. (g) by explosion or lightning, unless fire ensue, and, in that event, for loss or damage by fire only.

Chattel mortgage. Unless otherwise provided by agreement in writing added hereto the Subscribers shall not be liable for loss or damage to any property insured hereunder while incumbered by a chattel mortgage, and during the time of such incumbrance the Subscribers shall be liable only for loss or damage to any other property insured hereunder.

Fall of building. If a building, or any material part thereof, fall except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

Added Clauses. The extent of the application of insurance under this policy and of the contribution to be made by the Subscribers in case of loss or damage, and any other agreement not inconsistent with or a waiver of any of the conditions or provisions of this policy, may be provided for by agreement in writing added hereto.

Waiver. No one shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement added hereto, nor shall any such provision or condition be held to be waived unless such waiver shall be in writing added hereto, nor shall any provision or condition of this policy or any forfeiture be held to be waived by any requirement, act or proceeding on the part of the Subscribers relating to appraisal or to any examination herein provided for; nor shall any privilege or permission affecting the insurance hereunder exist or be claimed by the insured unless granted herein or by rider added hereto.

Cancellation of policy. This policy shall be cancelled at any time at the request of the insured, in which case the Subscribers shall, upon demand and surrender of this policy, refund the excess of paid deposit above the customary short rates for the expired time. This policy may be cancelled at any time by the Subscribers by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid deposit above the pro rata deposit for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess deposit (if not tendered) will be refunded on demand.

claim upon the collateral to the mortgage debt, but without impairing the mortgagee's right to sue; or they may pay the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

Requirements in case of loss. The insured shall give immediate notice, in writing, to the Subscribers, of any loss or damage, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, stating the quantity and cost of each article and the amount claimed thereon; and, **the insured shall, within sixty days after the fire, unless such time is extended in writing by the Subscribers, render to the Subscribers a proof of loss,** signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the fire, the interest of the insured and of all others in the property, the cash value of each item thereof and the amount of loss or damage thereto, all incumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish a copy of all the descriptions and schedules in all policies and if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by the Subscribers all that remains of any property herein described, and submit to examinations under oath by any person named by the Subscribers; and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable time and place as may be designated by the Subscribers or their representative, and shall permit extracts and copies thereof to be made.

Appraisal. In case the insured and the Subscribers shall fail to agree as to the amount of loss or damage, each shall, on the written demand of either, select a competent and disinterested appraiser. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire then, on request of the insured or the Subscribers, such umpire shall be selected by a judge of a court of record in the state in which the property insured is located. The appraisers shall then appraise the loss and damage stating separately sound value and loss or damage to each item; and failing to agree, shall submit their differences only, to the umpire. An award in writing, so itemized, of any two when filed with the Subscribers shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Subscribers' options. It shall be optional with the Subscribers to take all, or any part, of the articles at the agreed or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required; but

Abandonment. there can be no abandonment to the Subscribers of any property.

When loss payable. The amount of loss or damage for which the Subscribers may be liable shall be payable sixty days after proof of loss, as herein provided, is received by the Subscribers and ascertainment of the loss or damage is made either by agreement between the insured and the Subscribers expressed in writing or by the filing with the Subscribers of an award as herein provided.

Suit. No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, nor unless commenced within twelve months next after the fire.

Subrogation. The Subscribers may require from the insured an assignment of all right of recovery against any party for loss or damage to the extent that payment therefor is made by the Subscribers.

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FFECTIVE
XPIRES

ROPERTY

MOUNT $

NO.

EVIOUS
LICY NO.

ISSUED FOR

Canners Exchange Subscribers

Warner Inter-Insurance Bureau

BY
LANSING B. WARNER
INCORPORATED
ATTORNEY
540 NORTH MICHIGAN AVENUE
CHICAGO

It is important that the written portions of all policies covering the same property read exactly alike; if they do not they should be made uniform at once.

Please Read your Policy and the conditions

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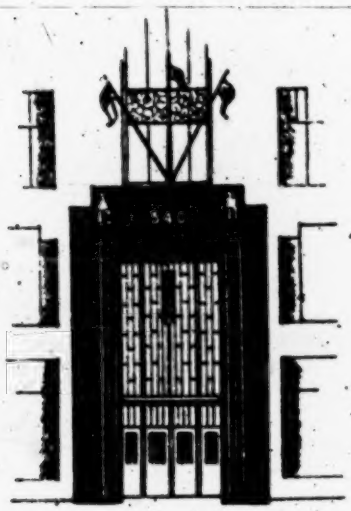
PLAINTIFF S' EXHIBIT 11



ANNUAL REPORT

WARNER RECIPROCAL INSURERS

For the Year Ended DECEMBER 31, 1939

LANSING B. WARNER, INCORPORATED

Agent

540 North Michigan Avenue

CHICAGO

LANSING B. WARNER	*President*
C. R. LELAND	*Executive Vice President*
JOHN ELIOT WARNER	*Vice President*
ARLINDO S. CATE	*Vice President*

ADVISORS

TOM HALE *McAlester, Oklahoma*	*Hale Halsell Co.*
J. W. HERSCHER *Charleston, West Virginia*	*Hubbard Grocery Co.*
E. G. KOONZ *Burlington, Iowa*	*John Blauls Sons Co.*
W. B. MACKEY *Philadelphia, Pennsylvania*	*H. Kellogg & Sons*
BEN A. MORTON *Knoxville, Tennessee*	*The H. T. Hackney Co.*

ANNUAL REPORT TO SUBSCRIBERS

THE ANNUAL REPORT of the condition, accomplishments and progress of Warner Reciprocal Insurers is presented herein for your information.

The Balance Sheet reflects a strong financial position at the close of the year and total Assets are now greater than ever before. The statement of Guaranty Deposits, Cost and Savings summarizes the year's results with regard to Guaranty Deposits of Subscribers, losses, expenses, interest and savings effected.

Since we first began issuing policies under the Warner plan many years ago, it has been our purpose to maintain close and friendly contacts with Subscribers. This has given us an intimate knowledge of their insurance problems and needs, which in turn has enabled us to develop a comprehensive and liberal type of protection that has proven adequate and satisfying.

Under this plan the careful selection of Subscribers and of risks for coverage has made it possible at the same time to provide superior protection at a very welcome saving in cost.

The year just ended has been very satisfactory from these standpoints. The experiences of Subscribers who have suf-

fered loss by fire, tornado, etc. have fully justified their confidence in the plan and its management.

We are grateful for these accomplishments and appreciate the loyal cooperation of the Subscribers who have made possible such excellent results through the years.

We look forward with confidence to still greater accomplishments during 1940 and express the hope that the year will bring you an increased measure of prosperity and happiness.

Yours very truly,

LANSING B. WARNER, INCORPORATED
Agent

Lansing B. Warner

January 2, 1940

President

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WARNER RECI

BAL

As at D

ASSETS

CASH IN BANKS	$ 728,131.9
UNITED STATES GOVERNMENT BONDS*	478,583.2
ACCRUED INTEREST ON UNITED STATES GOVERNMENT BONDS	3,923.5
DEPOSITS DUE FROM SUBSCRIBERS	211,246.9
SALVAGE	6,514.3
TOTAL	$1,428,399.9

*United States Government Bonds are carried at the lower of cost or pa

ACCO

To the Advisors, Warner Reciprocal Insurers, Chicago, Illinois.

We have examined the Balance Sheet of the Warner Recipro Cost and Savings, and the Statement of Savings, for the year ende of the Agent and, without making a detailed a[illegible] of the transacti and to the extent we deemed appropriate.

In preparing the attached Balance Sheet provisional deposit Unearned" under the caption "Reserves and Savings" rather than the year 1938

In our opinion, the accompanying Balance Sheet and relate fairly the position of the Insurers at December 31, 1939, and the principles applied on a basis consistent, except as noted in the pre

Chicago, Illinois
January 23, 1940

AL INSURERS

HEET

31, 1939

LIABILITIES

LOSSES IN PROCESS OF ADJUSTMENT		$ 5,635.00
ACCRUED TAXES AND OTHER EXPENSES		23,782.06
ACCOUNT PAYABLE TO THE AGENT		57,121.64
RESERVES AND SAVINGS:		
GUARANTY DEPOSITS UNEARNED	$ 687,459.46	
RESERVE FUND	425,915.23	
SAVINGS TO SUBSCRIBERS, UNDISTRIBUTED—1939	228,486.56	1,341,861.25
TOTAL		$1,428,399.95

ket value at December 31, 1939 was $542,182.81

REPORT

go, Illinois, as at December 31, 1939, the statement of Guaranty Deposits, e reviewed the system of internal control and the accounting procedures d or tested accounting records and other supporting evidence, by methods

icable to policies in force have been included with "Guaranty Deposits Guaranty Deposits—Payable to Subscribers," as in the annual report for

anty Deposits, Cost and Savings, and the Statement of Savings present d savings for the year, in conformity with generally accepted accounting with that of the preceding year.

PEAT, MARWICK, MITCHELL & CO.
Accountants and Auditors

WARNER RECIPROCAL INSURERS

GUARANTY DEPOSITS, COST AND SAVINGS

For the Year Ended December 31, 1939

GUARANTY DEPOSITS			
(Apportioned to Year 1939)			$ 868,766.64
ACTUAL COST:			
LOSSES:			
Losses Under Policies Issued—Net		$ 237,971.42	
Adjustment Expense		6,123.38	
		$ 244,094.80	
REINSURANCE PREMIUMS		110,884.20	
EXPENSES:			
Service Charge	$ 178,357.69		
Fees and Expenses of Advisors	4,284.88		
Taxes and State Fees	14,898.29		
Rating Bureau Expense	7,961.35		
Legal Expense—General	11,876.85		
Audit Expense	800.00		
Canadian Compliance Expense	180.00		
Exchange	479.02	218,838.08	
		$ 573,817.08	
DEDUCT:			
Interest on United States Government Bonds	$ 17,081.25		
Less—Interest Credited to Reserve Fund	14,768.06	2,313.19	
ACTUAL COST			571,503.89
GROSS SAVINGS			$ 297,262.75
DEDUCT—Agent's Portion of Savings			59,448.67
NET SAVINGS			$ 237,814.08

STATEMENT OF SAVINGS

For the Year Ended December 31, 1939

UNDISTRIBUTED 1938 SAVINGS as at December 31, 1938		$ 285,870.92
DEDUCT:		
Returned to Subscribers	$ 228,693.67	
Transferred to Reserve Fund	57,177.25	285,870.92
NET SAVINGS for the Year 1939	$ 237,814.08	
Less—Net Savings Returned to Retiring Subscribers	9,327.52	228,486.56
SAVINGS TO SUBSCRIBERS, UNDISTRIBUTED—1939		$ 228,486.56

TYPES OF COVERAGE AVAILABLE

Fire—Lightning

Tornado and Windstorm

Hail—Explosion

Riot and Civil Commotion

Aircraft Damage

Sprinkler Leakage

Use and Occupancy
(Business Interruption)

Builders' Risk

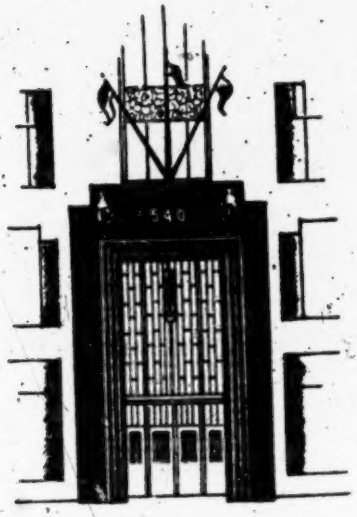
Rent and/or Rental Value

Improvements and Betterments

Leasehold Interest

Profits and/or Commissions

PLAINTIFFS' EXHIBIT 12 250



ANNUAL REPORT

CANNERS EXCHANGE SUBSCRIBERS

at

WARNER INTER-INSURANCE BUREAU

For the Year Ended DECEMBER 31, 1939

LANSING B. WARNER, INCORPORATED

Attorney in Fact

540 North Michigan Avenue

CHICAGO

LANSING B. WARNER . . . . . *President*

C. R. LELAND . . . . . *Executive Vice President*

JOHN ELIOT WARNER . . . . . *Vice President*

ARLINDO S. CATE . . . . . *Vice President*

ADVISORY COMMITTEE

HARRY L. CANNON . . . . . *H. P. Cannon & Son, Inc.*
Bridgeville, Delaware

A. M. LESTER . . . . . *California Packing Corporation*
San Francisco, California

EDW. F. TREGO . . . . . *Hoopeston Canning Company*
Hoopeston, Illinois

S. E. COMSTOCK . . . . . *Snider Packing Corporation*
Rochester, N. Y.

EDWARD B. COSGROVE . . . . *Minnesota Valley Canning Co.*
Le Sueur, Minnesota

LANSING B. WARNER . . . . . *Lansing B. Warner, Incorporated*
Chicago, Illinois

Thirty-second ANNUAL REPORT *to Subscribers*

WE TAKE pleasure in submitting the annual report of the results, accomplishments and progress of this plan for providing indemnity against loss.

Another year, the thirty-second, has been brought to a successful conclusion. Excellent progress has been made and very gratifying savings are again being returned to Subscribers.

The Balance Sheet reflects a strong cash position, unequalled by the ordinary type of insurance carrier, and Subscribers have positive assurance of the financial dependability of the plan.

The statement of Expense and Guarantee Fund Deposits, Cost and Savings presents clearly the progress made during 1939 and summarizes the deposits made by Subscribers, losses, expenses, interest and savings effected.

Through thirty-two years the plan has consistently demonstrated its efficiency and practicality. The superior quality of the protection provided and the low cost of the indemnity have merited the preeminent position which has been accorded to the plan not only by the canning industry but by insurance authorities everywhere.

We take this opportunity to express again our appreciation for the loyal support of the Canners and allied industries which has made these accomplishments possible and look forward with confidence to a continuation of this progress during the years to follow.

Wishing you a successful and prosperous year, we are,

Yours very truly,

LANSING B. WARNER, INCORPORATED
Attorney

January 2, 1940

Lansing B. Warner
President

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CANNERS EXCH

WARNER INTER

BAL

As at D

ASSETS

CASH IN BANKS	$1,632,617.48
UNITED STATES GOVERNMENT BONDS*	2,275,000.00
ACCRUED INTEREST ON UNITED STATES GOVERNMENT BONDS	16,583.06
DEPOSITS DUE FROM SUBSCRIBERS	203,566.96
SALVAGE	5,822.70
TOTAL	$4,133,590.20

*United States Government Bonds are carried at the lower of cost or par valu

ACCO

To the Advisory Committee, Canners Exchange Subscribers, Chicago,

We have examined the Balance Sheet of the Canners Excha 1939, the statement of Expense and Guarantee Fund Deposits, Cost a the system of internal control and the accounting procedures of the A tested accounting records and other supporting evidence, by method

In preparing the attached Balance Sheet provisional depos Guarantee Fund Deposits Unearned" under the caption "Reserves an to Subscribers" as in the annual report for the year 1938.

In our opinion, the accompanying Balance Sheet and relate of Savings present fairly the position of the Subscribers at December accepted accounting principles applied on a basis consistent, excep

Chicago, Illinois
January 18, 1940

E SUBSCRIBERS

RANCE BUREAU

EET

, 1939

LIABILITIES

OSES IN PROCESS OF ADJUSTMENT		$ 47,995.00
COUNTS PAYABLE TO SUBSCRIBERS		3,676.62
CRUED TAXES AND OTHER EXPENSES		35,297.11
ERVES AND SURPLUS:		
XPENSE AND GUARANTEE FUND		
EPOSITS UNEARNED	$ 997,264.87	
ESERVE FUND	541,532.00	
URPLUS RESERVE	1,657,620.39	
URPLUS (Undistributed 1939 Savings)	850,204.21	4,046,621.47
TOTAL		$4,133,590.20

December 31, 1939 was $2,501,056.25.

ar

ister-Insurance Bureau, Chicago, Illinois, as at December 31,
ent of Savings, for the year ended on that date, have reviewed
ncluding a detailed audit of the transactions, have examined or
ined appropriate.
ch to policies in force have been included with "Expense and
dule caption "Expense and Guarantee Fund—Deposits Payable

nGuarantee Fund Deposits, Cost and Savings, and Statement
xpenses and savings for the year, in conformity with generally
paragraph, with that of the preceding year.

PEAT, MARWICK, MITCHELL & CO.
Accountants and Auditors

CANNERS EXCHANGE SUBSCRIBERS
at
WARNER INTER-INSURANCE BUREAU
EXPENSE AND GUARANTEE FUND DEPOSITS, COST AND SAVINGS
For the Year Ended December 31, 1939

EXPENSE AND GUARANTEE FUND DEPOSITS			
(Apportioned to Year 1939)			$1,896,276.14
ACTUAL COST:			
LOSSES:			
Losses Under Policies Issued—Net		$ 457,001.48	
Adjustment Expense		2,379.64	
		$ 459,381.12	
REINSURANCE PREMIUMS		55,227.87	
EXPENSES:			
Service Charge	$ 472,822.92		
Advisory Committee Expense	3,863.60		
Taxes and State Fees	21,269.69		
Rating Bureau Expense	15,950.91		
Legal Expense—General	21,036.69		
Audit Expense	900.00		
Canadian Compliance Expense	720.00		
Exchange	1,001.38	537,565.19	
		$1,052,174.18	
DEDUCT:			
Interest on United States Government Bonds	$ 73,506.25		
Less—Interest Credited to Surplus Reserve	51,847.09	21,659.16	
ACTUAL COST			1,030,515.02
SAVINGS			$ 865,761.12

STATEMENT OF SAVINGS
For the Year Ended December 31, 1939

UNDISTRIBUTED 1938 SAVINGS as at December 31, 1938		$ 922,348.43
DEDUCT:		
Returned to Subscribers	$ 737,878.74	
Transferred to Surplus Reserve	184,469.69	922,348.43
SAVINGS for the Year 1939	$ 865,761.12	
Less—Savings Returned to Retiring Subscribers	15,556.91	850,204.21
UNDISTRIBUTED 1939 SAVINGS		$ 850,204.21

TYPES OF COVERAGE AVAILABLE

Fire—Lightning

Tornado and Windstorm

Hail—Explosion

Riot and Civil Commotion

Aircraft Damage

Sprinkler Damage

Production Earnings
(Business Interruption)

Builders' Risk

Rent and/or Rental Value

Improvements and Betterments

Leasehold Interest

Profits and/or Commissions

PLAINTIFF S' EXHIBIT 13

POLICY NUMBER

AGENCY AT

SWORN STATEMENT IN PROOF OF LOSS TO THE

AMOUNT OF POLICY

$

DATE OF EXPIRATION

of

BY YOUR POLICY OF INSURANCE ABOVE DESCRIBED, YOU INSURED

(hereinafter called Insured) according to the terms and conditions contained therein, the written portion thereof and all endorsements, transfers and assignments thereon being attached hereto.

(Copies of all endorsements, transfers, assignments and all the descriptions and schedules in all other policies will be furnished on demand.)

A fire occurred on the day of about the hour of o'clock M., which upon the best knowledge and belief of Insured **originated**

The **Building or Premises** described, or containing the property described, was **occupied** at the time of said fire as follows:

By

as or for

and for no other purpose.

When your policy was issued—or if assigned with your consent, when such assignment was made and consented to—Insured was the sole, absolute and unconditional owner of the property described (and if a building, of the land on which it stood) and no other person or persons had any interest, lien or incumbrance therein or thereon, nor has there been any change in the title, use, occupation, location, possession or exposure of said property, except

The Actual Cash Value of the described property at time of said fire was $

The Actual Loss and Damage to the described property as result of said fire was $

(More particularly set forth in statement of loss attached.)

The Total Insurance covering the described property including this and all other policies, binders and/or agreements to insure at time of said fire was $

Insured Claims and will accept in full satisfaction and compromise settlement under this policy the sum of $

AND DEMAND NO MORE

The said fire did **not** originate by any act, design or procurement on the part of Insured or this affiant; nothing has been done by, or with, the privity or consent of the Insured or this affiant to violate the conditions of the policy or render it void; no articles are mentioned herein or in annexed schedules but which were in or on the premises described and which belonged to and were in custody or control of Insured at time of said fire.

No property saved has been in any manner concealed and no attempt to deceive the said Insurer as to the extent of said loss or otherwise has in any manner been made.

Any other information that may be required will be furnished on call and considered a part of this proof.

When your policy was issued—or if assigned with your consent, when such assignment was made and consented to—Insured was the sole, absolute and unconditional owner of the property described (and if a building, of the land on which it stood) and no other person or persons had any interest, lien or incumbrance therein or thereon, nor has there been any change in the title, use, occupation, location, possession or exposure of said property, except _____

_____

_____

_____

The Actual Cash Value of the described property at time of said fire was . . . . . $_____

The Actual Loss and Damage to the described property as result of said fire was . . . . . $_____
(More particularly set forth in statement of loss attached.)

The Total Insurance covering the described property including this and all other policies, binders and/or agreements to insure at time of said fire was . . . . . $_____

Insured Claims and will accept in full satisfaction and compromise settlement under this policy the sum of . . . . . $_____
AND DEMAND NO MORE

The said fire did **not** originate by any act, design or procurement on the part of Insured or this affiant; nothing has been done by, or with, the privity or consent of the Insured or this affiant to violate the conditions of the policy or render it void; no articles are mentioned herein or in annexed schedules but which were in or on the premises described and which belonged to and were in custody or control of Insured at time of said fire.

No property saved has been in any manner concealed and no attempt to deceive the said Insurer as to the extent of said loss or otherwise has in any manner been made.

Any other information that may be required will be furnished on call and considered a part of this proof.

It is expressly understood and agreed that the furnishing of this blank to the Insured, or the preparing of proofs by an adjuster, or any agent of the Insurer named herein, is not a waiver of any rights of the said Insurer.

Witness _____ hand at _____ } _____
this _____ day of _____ } The Insured.
By _____

State of _____ County of _____

Personally appeared before me, the day and date above written _____
signer(s) of the foregoing statement who made solemn oath to the truth of same and that no material fact is withheld of which the said Insurer should be advised.

_____ (Seal)
Notary Public

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Forms and Endorsements

Statement of Loss
and
Schedule of Insurance and Apportionment of Claim

Claim No._____

SWORN STATEMENT IN PROOF OF LOSS TO THE

of_____

Insured_____

Agency_____

Policy No._____

Amount of Policy ____ $_____

Amount Claimed ____ $_____

Less Discount ____ $_____

Amount Paid ____ $_____

Adjusting Expense ___ $_____

Date of Fire_____

COOK COUNTY LOSS ADJUSTMENT BUREAU, OCTOBER, 1927
FORM NO. 128

CERTIFICATE OF MAGISTRATE OR NOTARY PUBLIC

State of_____ } ss.
County, of_____ }

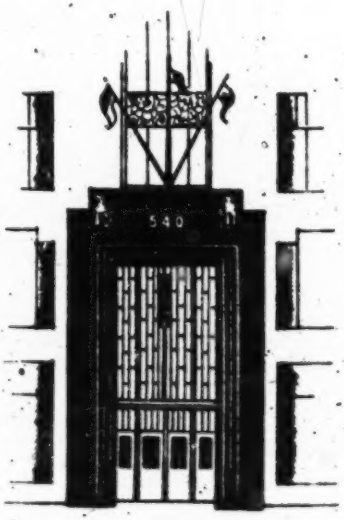
I_____ of_____

a_____ living nearest the property described in the policy herein referred to which property has been damaged or destroyed by fire hereby certify that I am not interested in the claim herein made either as creditor or otherwise nor related to the Insured or sufferers; that I have examined the circumstances attending the fire or damage as alleged and believe the Insured has honestly sustained loss and damage on the property described in and covered by said policy to the amount of $_____ and no more.

In testimony whereof I have hereunto set my hand and official seal this____ day of_____

PLAINTIFF'S EXHIBIT 14

260



ANNUAL REPORT

of

WARNER RECIPROCAL INSURERS

For the Year Ending DECEMBER 31, 1938

LANSING B. WARNER INCORPORATED

Agent

540 North Michigan Avenue

CHICAGO

LANSING B. WARNER . . . . . *President*

C. R. LELAND . . . . . *Executive Vice President*

JOHN ELIOT WARNER . . . . . *Vice President*

ADVISORS

TOM HALE . . . . . *Hale Halsell Co.*
McAlester, Oklahoma

J. W. HERSCHER . . . . . *Hubbard Grocery Co.*
Charleston, West Virginia

E. G. KOONZ . . . . . *John Blauls Sons Co.*
Burlington, Iowa

W. B. MACKEY . . . . . *H. Kellogg & Sons*
Philadelphia, Pennsylvania

BEN A. MORTON . . . . . *The H. T. Hackney Co.*
Knoxville, Tennessee

ANNUAL REPORT TO POLICYHOLDERS

IT GIVES us great pleasure to submit this annual report setting out the accomplishments realized during the year just ended under this specialized plan. The progress made was very gratifying.

The plan has been in operation for many years. During this time the dependability of the protection afforded is shown by our record of prompt and equitable loss payments, which is of primary importance.

The aggregate refund for 1938, designated "Savings," amounted to $372,314.13 which, when compared to the premiums you would otherwise pay to the insurance companies for insurance carried, represents a refund of 39%. This brings the total savings over the past years to $4,481,152.90. These results substantiate our repeated assertion that fire losses on our carefully selected properties are far below the general average, and therefore produce a lower net cost.

We have consistently enlarged and improved the scope of the service we render, and our facilities for protection today are comprehensive enough to include every item of importance which would present itself to the alert business man.

We appreciate the fact that these accomplishments have been made possible only through your loyalty, cooperation and support. May we take this opportunity, therefore, to express our

thanks to you and to assure you that it is our sincere desire to continue to serve you efficiently and economically. We would appreciate your availing yourself of the facilities we have established to serve you better, and we look forward to any opportunity you may give us to demonstrate our capabilities along these lines. Our entire personnel joins me in offering to you the benefits of our combined knowledge and experience.

Wishing you a Prosperous and Happy Year, we are, dear Sirs,

Yours very truly,

LANSING B. WARNER INCORPORATED,

Agent

Lansing B. Warner

January 3, 1939 President

WARNER REC

BA

As at

ASSETS

CASH IN BANKS	$ 759,479.
*UNITED STATES GOVERNMENT SECURITIES	478,583.
ACCRUED INTEREST ON UNITED STATES GOVERNMENT SECURITIES	3,923.
GUARANTY DEPOSITS—DUE FROM SUBSCRIBERS	173,146.
DUE FROM REINSURERS	2,488.
TOTAL	$1,417,622.

*United States Government Securities are carried at the lower of cost or p
value. Market value at December 31, 1938 was $540,010.94.

AC

To the Advisors, Warner Reciprocal Insura

*We have made an examination of t
December 31, 1938. In connection therewith
supporting evidence, and obtained informa
made a general review of the accounting m
for the year, but we did not make a detail*

*In our opinion, based upon such exa
accepted principles of accounting, the fina*

Chicago, Illinois
January 23, 1939

AL INSURERS

EET

, 1938

LIABILITIES

JUSTED LOSSES—ESTIMATED		$ 11,030.49
RUED LIABILITIES:		
CESS INSURANCE PREMIUMS	$ 31,240.94	
AXES	9,148.20	
HER EXPENSES	1,037.62	41,426.76
COUNT PAYABLE TO THE AGENT		71,471.57
ANTY DEPOSITS—PAYABLE TO SUBSCRIBERS		19,554.65
RVES AND SAVINGS:		
ARANTY DEPOSITS—UNEARNED	$ 588,139.54	
SERVE FUND	400,128.43	
VINGS TO SUBSCRIBERS		
UNDISTRIBUTED—1938	285,870.92	1,274,138.89
TOTAL		$1,417,622.36

RT

...surers, Chicago, Illinois, as at ...ing records of the Agent and other ...t and employees thereof; we also ...ing to the costs, expenses and savings

...Just fairly presents, in accordance with December 31, 1938.

PEAT, MARWICK, MITCHELL & CO
Accountants and Auditors

WARNER RECIPROCAL INSURERS

STATEMENT OF ESTIMATED AND ACTUAL COST

For the Year Ended December 31, 1938

*ESTIMATED COST:			
Guaranty Deposits Unearned as at December 31, 1937			$ 593,906.38
Guaranty Deposits Made	$1,432,891.15		
Less—Cancellations (net)	528,741.00		904,150.15
			$1,498,056.53
DEDUCT:			
Guaranty Deposits Unearned as at December 31, 1938	$ 588,139.54		
Service Expense on Unearned Guaranty Deposits	147,034.88		735,174.42
ESTIMATED COST			$ 762,882.11
ACTUAL COST:			
LOSSES:			
Losses—Net	$ 114,001.38		
Loss Adjustment Expense	2,588.14	$ 116,589.52	
EXCESS INSURANCE PREMIUMS		89,485.22	
EXPENSES:			
Service Expense	$ 157,103.58		
Fees and Expenses of Advisory	3,745.19		
Audit Expense	750.00		
Canadian Compliance Expense	180.00		
Rating Bureau Expense	6,558.49		
Exchange on Insurers' Checks	460.58		
General Legal Expense	5,926.29		
Insurance Departments' Licenses and Fees	2,332.75		
Taxes	10,557.64	187,614.52	
		$ 393,689.26	
DEDUCT:			
Interest on United States Government Securities	$ 17,081.25		
Less—Interest Credited to Reserve Fund	13,959.97	3,121.28	
ACTUAL COST			$ 390,567.98
SAVINGS FOR THE YEAR ENDED DECEMBER 31, 1938			$ 372,314.13
LESS			
Savings Returned to Subscribers During Year		$ 11,963.65	
Savings Credited To The Agent		74,479.56	86,443.21
UNDISTRIBUTED SAVINGS TO SUBSCRIBERS—DECEMBER 31, 1938			$ 285,870.92

*The Estimated Cost represents the Net Earned Guaranty Deposits.

FIRE LOSSES

The total amount of the fire loss claims by Policyholders during 1938 was very moderate. This is an excellent testimonial to the high grade of properties indemnified under this plan.

The known sources of fire among our Policyholders are confined to a few principal causes and the resultant fires are largely preventable. We are outlining these hazards and earnestly solicit your cooperation in reducing the chances for fire on your premises. A little care and forethought on the part of each Policyholder will help materially to prevent such fires and bring the cost of the insurance down still further.

A large number of fires have started from hostile sparks from stacks, chimneys, cupolas and machinery. If stacks are extended sufficiently high above the roof, if screens and spark arresters are installed wherever possible, and the roofs and roof houses and other combustible material are protected with non-combustible coverings, this danger will be minimized.

Defective installations of heating devices and faulty chimneys and flues are also responsible for many fires. Check up on these arrangements. See that there is at least two feet of clearance between heating units and any surrounding combustible material. Check your chimneys, metal stacks, and flues. Even a brick chimney is unsafe unless there is at least two inches of air space between the brick and the surrounding woodwork, floors, headers, joists, posts, roofboards, etc.

Electrical fires from old or worn wiring, overloaded circuits, etc., are next in importance as a cause of fire. Your entire electrical system should be checked over from time to time by an expert electrician. Makeshift wiring and doctored fuses should be religiously avoided.

Fires from matches, cigarettes and careless disposition of smoking materials are very common causes of fire. Write us for a supply of "No Smoking" signs; post them in conspicuous places and enforce the "No Smoking" rule.

Spontaneous ignition in oily rags, waste, rubbish, etc., costs millions of dollars in fire losses every year. If premises are cleaned up daily and "out-of the way" places are not allowed to accumulate rubbish, papers and waste material, this hazard will be materially lessened. Metal lockers and metal safety cans will further aid in eliminating this common source of fire.

Write this office for suggestions on fire hazards of any description. We shall be glad to send you details and specifications for the installation of fire preventive and protective devices, heating units, "first aid" equipment, etc. There is no charge for this service and we may be able to point the way to substantial savings in the cost of your installations.

STABILITY

Throughout the many years of this plan's successful operation, the protection of Policyholders' interests has always been uppermost in

importance. The Reserves and Surpluses credited to the individual Policyholders have been accumulated to guarantee the prompt and full payment of every legitimate claim. A liberal, sympathetic policy of claim adjustments has been established, and extensive reinsurance arrangements have been perfected to take care of any contingency.

These safeguards assure the Policyholder of dependable protection in any emergency and have won for the Warner plan its rating of "A plus" from Alfred M. Best & Co. as well as the high regard and respect of insurance authorities, financial institutions, government agencies, and the insurance buying public generally.

THE WARNER ORGANIZATION

The offices of Lansing B. Warner Incorporated are located at 540 North Michigan Ave., a short distance north from the Chicago "loop." You are cordially invited to visit these offices when you are in Chicago and inspect the facilities which have been installed for the prompt handling of your requirements.

The Warner organization consists of a group of about 125 people, who are all equipped by training and experience to serve you and will consider it a pleasure to do so. Many of these individuals have had from fifteen to thirty years of service with the organization. The personnel of our Underwriting, Accounting, Filing, and Stenographic Departments has been steadily improved so that your requirements may be handled with more dispatch and efficiency.

In the field our staff of trained engineers has been increased to thirty and Policyholders in every section of the country are now able to contact one of these representatives on very short notice for expert counsel and advice.

Take advantage of the complete service which has thus been made available to you. You can do so without extra cost and you will have the comfort of knowing that your insurance program is arranged in the best possible manner.

ECONOMY

Again a 39% saving has been returned to Policyholders. This means that the type of risk selected under this plan is steadily improving. The inspection and engineering service rendered gratis by our trained staff is contributing much to this trend while the steadily wider growing distribution of risks makes for a more constant average fire loss ratio. Administrative expense is fixed by contract and continues to average about one-half of the corresponding expense of the ordinary insurance companies. This economical operation in both fire losses and administrative expenses results in the substantial savings which are returned annually to Policyholders.

COMPARATIVE STATISTICS

5 Year Period 1934-1938 Inclusive

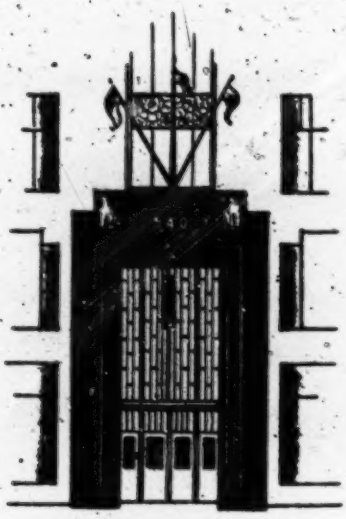
	Cash Assets	*Savings**	*Paid Claims*
1934	$904,302.71	$219,414.12	$199,497.80
1935	933,679.05	231,483.29	205,077.91
1936	1,030,737.98	270,723.97	168,284.54
1937	1,220,273.81	343,970.54	115,176.56
1938	1,417,632.36	372,314.13	116,589.52

**Additional savings from interest earnings on Reserve Fund not included in these figures.*

TYPES OF COVERAGE AVAILABLE

Fire—Lightning
Tornado and Windstorm
Hail—Explosion
Riot and Civil Commotion
Aircraft Damage
Sprinkler Leakage
Use and Occupancy
(Business Interruption)
Builders' Risk
Rent and/or Rental Value
Improvements and Betterments
Leasehold Interest
Profits and/or Commissions

PLAINTIFF'S EXHIBIT 15 270



ANNUAL REPORT

of

CANNERS EXCHANGE SUBSCRIBERS

at

WARNER INTER-INSURANCE BUREAU

For the Year Ending DECEMBER 31, 1938

LANSING B. WARNER INCORPORATED

Attorney in Fact

540 North Michigan Avenue

CHICAGO

LANSING B. WARNER . . . . . *President*

C. R. LELAND . . . . . *Executive Vice President*

JOHN ELIOT WARNER . . . . . *Vice President*

ADVISORY COMMITTEE

HARRY L. CANNON . . . . . *H. P. Cannon & Son, Inc.*
Bridgeville, Delaware

A. M. LESTER . . . . . *California Packing Corporation*
San Francisco, California

EDW. F. TREGO . . . . . *Hoopeston Canning Company*
Hoopeston, Illinois

S. E. COMSTOCK . . . . . *Snider Packing Corporation*
Rochester, N. Y.

EDWARD B. COSGROVE . . . . *Minnesota Valley Canning Co.*
Le Sueur, Minnesota

Thirty-first ANNUAL REPORT *to Policyholders*

It is with great pleasure that we submit the thirty-first consecutive annual report of the results of the plan by which the Canners provide indemnity for themselves at actual cost. The results are gratifying and clearly demonstrate that the basic principles of the plan provide sound protection specifically adapted to the needs of the industry.

We have made a sincere and consistent effort to improve our facilities for rendering the service which today is recognized as one of the fundamental principles of this plan. Fire losses among Canners during 1938 were slightly higher than last year, but Subscribers are to be congratulated on the fact that the most disastrous fires in the industry occurred in plants which were not participating in this exchange of indemnity.

For the year just closed, the aggregate return to Subscribers designated "Savings," amounts to $933,105.51. This is an excellent showing which compares favorably with that of former years. Total Savings to Subscribers since the origin of the plan in 1907 have amounted to $13,826,136.80.

Insurance costs continue to show a downward trend on canning factory properties in general. These costs are today less than one-half of what they were when this plan was originated and we believe this decrease has been largely due to our efforts.

We are looking forward to the continuation of these results during 1939 and to that end we pledge our whole-hearted cooperation.

We take this opportunity to thank you for your loyal support and cooperation and want to express a sincere wish that the coming year will hold forth ever increasing reasons for encouragement.

Sincerely,

LANSING B. WARNER INCORPORATED

Attorney

Lansing B. Warner

January 3, 1939

President

CANNERS EXCHANGE SUBSCRIBE

BA

As at

ASSETS

CASH IN BANKS	$1,631,75
*UNITED STATES GOVERNMENT SECUPITIES	2,275,00
ACCRUED INTEREST ON UNITED STATES GOVERNMENT SECURITIES	16,58
EXPENSE AND GUARANTEE FUND—DUE FROM SUBSCRIBERS	242,14
SALVAGE -ESTIMATED	55,83
TOTAL	$4,221,32

*United States Government Securities are carried at the lower of cost or value. Market Value at December 31, 1938 was $2,476,254.69.

A

To the Advisory Committee, Canners Excha

We have made an examination of the Insurance Bureau, Chicago, Illinois, as at D accounting records of the Attorney-in-Fact tions from the Attorney-in-Fact and employ and of the accounts pertaining to the co audit of the transactions.

In our opinion, based upon such exam accepted principles of accounting, the fina

Chicago, Illinois
January 18, 1939

RNER INTER-INSURANCE BUREAU

EET

, 1938

LIABILITIES

OUNT DUE TO REINSURERS		$ 52,212.36
ADJUSTED LOSSES—ESTIMATED		5,750.00
CRUED LIABILITIES:		
AXES	$ 21,321.75	
THER EXPENSES	1,774.58	23,096.33
ENSE AND GUARANTEE FUND—DEPOSITS AYABLE TO SUBSCRIBERS		50,428.13
ERVES AND SURPLUS:		
PENSE AND GUARANTEE FUND		
DEPOSITS UNEARNED	$1,075,448.46	
SERVE FUND	563,255.00	
RPLUS RESERVE	1,528,[illegible].58	
RPLUS (UNDISTRIBUTED SAVINGS—YEAR 1938)	922,348.43	4,089,833.47
TOTAL		$4,221,320.29

...Exchange Subscribers at Warner Inter-... therewith, we examined or tested the ...ed obtained information and explana-...neral review of the accounting methods ...e year, but we did not make a detailed ...

...Sheet fairly presents, in accordance with ...at December 31, 1938.

PEAT, MARWICK, MITCHELL & CO.
Accountants and Auditors

CANNERS EXCHANGE SUBSCRIBERS AT WARNER INTER-INSURANCE BUREAU

STATEMENT OF ESTIMATED AND ACTUAL COST
For the Year Ended December 31, 1938

*ESTIMATED COST:			
Expense and Guarantee Fund Deposits Unearned as at December 31, 1937			$1,119,464.29
Expense and Guarantee Fund Deposits Made		$3,381,102.20	
Less—Cancellations (net)		1,398,382.83	1,982,719.37
			$3,102,183.66
Deduct—Expense and Guarantee Fund Deposits Unearned as at December 31, 1938			1,075,448.46
*ESTIMATED COST			$2,026,735.20
ACTUAL COST:			
LOSSES:			
Losses—Net	$ 472,767.16		
Loss Adjustment Expense	2,979.17		
Loss Legal Expense	2,411.07	$478,177.40	
EXCESS INSURANCE PREMIUMS		61,465.47	
EXPENSES:			
Service Expense	$ 521,038.83		
Advisory Committee Expense	2,924.91		
Audit Expense	850.00		
Canadian Compliance Expense	720.00		
Rating Bureau Expense	14,768.52		
Exchange on Subscribers' Checks	911.36		
General Legal Expense	13,684.36		
Licenses and Fees—State Insurance Departments	1,536.64		
Taxes	22,924.22	579,358.84	
		$1,119,001.71	
DEDUCT:			
Interest on United States Government Securities	$ 73,506.25		
Less—Interest Credited to Surplus Reserve	48,134.23	25,372.02	
ACTUAL COST			1,093,629.69
SAVINGS FOR THE YEAR 1938			$ 933,105.51
LESS—Net Savings Returned During Year			10,757.08
SAVINGS UNDISTRIBUTED DECEMBER 31, 1938			$ 922,348.43

*The Estimated Cost represents the Net Earned Expense and Guarantee Fund Deposits.

FIRE LOSSES

In view of the large values in storage throughout the year, we feel that the Subscribers are to be congratulated on the absence of any exceedingly large fire losses. This situation reflects the inherent fire consciousness which prevails among Canners generally and makes possible the successful operation of a plan such as ours.

In the interests of fire prevention generally, we should like to recommend to you that you periodically make a personal checkup of the chances of fire originating in your plant. Keep fire prevention uppermost in mind on this tour of inspection and you will find many opportunities for exercising care and forethought in the prevention of fire.

The causes responsible for most fires seem to remain the same and to maintain their relative positions of importance, namely:

1. Defective heating arrangements, chimneys and flues.
2. Misuse of electric power, wiring and appurtenances.
3. Smoking and careless disposal of smoking material.
4. Spontaneous ignition in rubbish, waste, etc.

Defective installations of heating devices and faulty chimneys and flues are responsible for many fires. Check up on these arrangements. See that there is at least two feet of clearance between heating units and any surrounding combustible material. Check your chimneys, metal stacks, and flues. Even a well constructed brick chimney is unsafe unless there is at least two inches of air space between the brick and the surrounding woodwork, floors, headers, joists, posts, roofboards, etc.

Electrical fires from old or worn wiring, overloaded circuits, etc., are next in importance as a cause of fire. Your entire electrical system should be checked over from time to time by an expert electrician. Makeshift wiring and doctored fuses should be religiously avoided.

Fires from matches, cigarettes and careless disposition of smoking materials are very common causes of fire. Write us for a supply of "No Smoking" signs; post them in conspicuous places and enforce the "No Smoking" rule.

Spontaneous ignition in oily rags, waste, rubbish, etc., costs millions of dollars in fire losses every year. If premises are cleaned up daily and "out of the way" places are not allowed to accumulate rubbish, papers and waste material, this hazard will be materially lessened. Metal lockers and metal safety cans will further aid in eliminating this common source of fire.

Write this office for suggestions on fire hazards of any description. We shall be glad to give you details and specifications for the installation of fire preventive and protective devices, heating units, "first aid" equipment, etc. There is no charge for this service and we may be able to point the way to substantial savings in the cost of your installations.

THE WARNER ORGANIZATION

The offices of Lansing B. Warner Incorporated are located at 340 North Michigan Ave., a short distance north from the Chicago "loop." You are cordially invited to visit these offices when you are in Chicago and inspect the facilities which have been installed for the prompt handling of your requirements.

The Warner organization consisting of a group of about 125 people are all equipped by training and experience to serve you and will consider it a pleasure to do so. Many of these individuals have had from fifteen to thirty years of service with the organization. The personnel of our Underwriting, Accounting, Filing, and Stenographic Departments has been steadily improved so that your requirements may be handled with more dispatch and efficiency.

In the field our staff of trained engineers has been increased to thirty and Subscribers in every section of the country are now able to contact one of these representatives on very short notice for expert counsel and advice.

Take advantage of the complete service which has thus been made available to you. You can do so without extra cost and you will have the comfort of knowing that your insurance program is arranged in the best possible manner.

THE LAW OF AVERAGES

All insurance is governed by the Law of Averages. In a given number of average properties, there will be a certain average number of fires. There may be fluctuations either up or down and fires may vary in number and intensity from year to year but actual results have demonstrated over a long period of years that a very consistent grand average will be maintained. Over five or ten year periods, there is but very little fluctuation in this grand average.

If a number of these properties can be carefully segregated from the standpoint of honest ownership, location, construction and maintenance, their fire loss average will show a decided drop. The truth of this principle has been clearly demonstrated by our accomplishments during the past thirty-one years. It has meant a lower cost to the Subscribers and is the logical reason for the Savings which have been returned under this plan.

COMPARATIVE STATISTICS—5 YEARS

1934-1938 Inclusive

	Cash Assets	*Paid Claims*	*Savings*
1934	$2,942,139.82	$179,048.03	$716,967.54
1935	3,319,257.75	308,138.63	742,610.64
1936	3,594,889.66	269,801.02	860,416.86
1937	4,157,967.69	210,599.20	1,016,995.76
1938	4,221,320.29	178,177.40	933,105.51

TYPES OF COVERAGE AVAILABLE

Fire—Lightning

Tornado and Windstorm

Hail—Explosion

Riot and Civil Commotion

Aircraft Damage

Sprinkler Damage

Production Earnings
(Business Interruption)

Builders' Risk

Rent and/or Rental Value

Improvements and Betterments

Leasehold Interest

Profits and/or Commissions

PLAINTIFFS' EXHIBIT 16

Form 57. 1-15-30-2000 (14-4300)

STATE OF NEW YORK

Corporation Certificate

Insurance Department

ALBERT CONWAY

SUPERINTENDENT OF INSURANCE

It is hereby certified *that* the subscribers who are doing business as inter-insurers under the title of

MARINER RECIPROCAL INSURERS, of Chicago, Illinois,

have
~~has~~ *complied with all the requirements of law to be observed by such* subscribers
~~corporation~~
they are
~~it is~~ *and that* ~~it is~~ *authorized to transact within this State the business* of fire, lightning, hail, windstorm, use and occupancy and sprinkler leakage insurance pursuant to the provisions of Section 305 of the Insurance Law.

In Witness Whereof, *I have hereunto set my hand, and affixed the official seal of this Department in duplicate, at the City of Albany, this* 24th *day of* April 19 30.

Albert Conway

Superintendent of Insurance.

PLAINTIFF'S' EXHIBIT 17

Form 87. 1-15-29-2000 (14-4250) STATE OF NEW YORK Corporation Certificate

Insurance Department

ALBERT CONWAY

SUPERINTENDENT OF INSURANCE

It is hereby certified *that* the subscribers who are doing business as inter-insurers under the title of

CANNERS EXCHANGE SUBSCRIBERS AT WARNER INTER-INSURANCE BUREAU, of Chicago, Illinois,

have *complied with all the requirements of law to be observed by such* subscribers, they are *authorized to transact within this State the business* of fire, lightning, hail, windstorm, use and occupancy and sprinkler leakage insurance pursuant to the provisions of Section 305 of the Insurance Law.

In Witness Whereof, I have hereunto set my hand, and affixed the official seal of this Department in duplicate, at the City of Albany, this 24th *day of* April *19*30.

Albert Conway

Superintendent of Insurance.

PLAINTIFF'S' EXHIBIT 18

STATE OF ILLINOIS
DEPARTMENT OF INSURANCE

I, the undersigned, Director of Insurance of the State of Illinois, do hereby certify that the annexed instrument is a full, true and correct copy of

REPORT OF EXAMINATION OF

WARNER RECIPROCAL INSURERS
CHICAGO

DATED: JUNE 19, 1937 AND

ORDER OF DIRECTOR OF INSURANCE
APPROVING, ADOPTING AND FILING
REPORT AS AN OFFICIAL RECORD

UNDER DATE OF
OCTOBER 18, 1937

now on file in and forming a part of the records of this department.

now on file in and forming a part of the records of this department.

In Testimony Whereof, *I hereto set my hand and cause to be affixed the Seal of my office.*

Done at the City of Springfield, this 5th

day of November *A. D.* 1937

Ernest Palmer

Director of Insurance

UNITED STATES OF AMERICA,
STATE OF ILLINOIS,
Office of SECRETARY OF STATE, } ss.

I, EDWARD J. HUGHES, Secretary of State of the State of Illinois, hereby certify that

ERNEST PALMER

is now, and has been since THE 1ST day of JULY A. D. 19 33

DIRECTOR OF INSURANCE

State of Illinois

duly commissioned and qualified, and that as such, full faith and credit is, and ought to be, given to his official

attestations,

UNITED STATES OF AMERICA,
STATE OF ILLINOIS, } ss.
Office of SECRETARY OF STATE,

I, EDWARD J. HUGHES, Secretary of State of the State of Illinois, hereby certify that

ERNEST PALMER

is now, and has been since THE 1ST day of JULY A. D. 19 33

DIRECTOR OF INSURANCE

State of Illinois

duly commissioned and qualified, and that as such, full faith and credit is, and ought to be, given to his official attestations.

In Testimony Whereof, I hereto set my hand and cause to be affixed the Great Seal of State.

Done at the City of Springfield, this 14TH day of MARCH A. D. 1940

Edward J. Hughes

Secretary of State

(S7,096 2M-11-32) 3

397

[fol. 398]

State of Illinois
Henry Horner, Governor
Department of Insurance
Springfield

ERNEST PALMER
Director

The attached report of examination as of December 31, 1936 of the condition and affairs of the Warner Reciprocal Insurers, Chicago, was recently completed by duly qualified examiners of this Department.

Due consideration has been given to the comment of the examiners regarding the operation of the Exchange and its financial condition as reflected from the report. The report is hereby as of this date approved, adopted and filed and made an official record of this Department.

Department of Insurance. Ernest Palmer, Director of Insurance.

Dated this 18th day of October, 1937.

[fol. 399] I hereby certify that the attached report of examination dated June 19, 1937 shows the condition and affairs of the Warner Reciprocal Insurers, Chicago, as of December 31, 1936.

This report has been reviewed and is hereby approved.

Lorenz Jost, Chief Examiner.

Dated this 18th day of October, 1937.

[fol. 400] June 19, 1937.

Honorable Jess G. Read, Chairman, Committee on Examinations, National Convention of Insurance Commissioners, Oklahoma City, Oklahoma.

Honorable Ernest Palmer, Director of Insurance, Springfield, Illinois.

Honorable John J. Holmes, State Auditor and Ex Officio Commissioner of Insurance, Helena, Montana.

Honorable Wesley S. Hanna, Insurance Commissioner, Baltimore, Maryland.

Pursuant to instructions contained in Fire Warant No. 2, dated May 24, 1937, an examination has been made of

the affairs of the Warner Reciprocal Insurers, 540 North Michigan Boulevard, Chicago, Illinois, and a detailed report thereof follows.

Raymond G. Lonnon, Examiner, Representing the State of Illinois. E. E. Grabow, Special Examiner, Representing the State of Montana. A. M. Payne, Examiner, Representing the State of Maryland.

[fol. 401] Examination Report

Date: June 19, 1937.

No. of Warant: No. 2 Fire, dated May 24, 1937.

Examination of: Warner Reciprocal Insurers, 540 N. Michigan Boulevard, Chicago, Illinois.

Type of Organization: Inter-Insurance Exchange.

Licensed: December 29, 1925 in accordance with "An Act concerning the business of Reciprocal or Inter-Insurance." (Approved June 20, 1921.)

Business Written: Fire and Allied Lines.

Date of Last Examination: December 31, 1933.

Period Covered by this Examination: January 1, 1934 to December 31, 1936.

Total Admitted Assets		$1,082,152.09
Total Liabilities		$368,436.96
Reserve Fund	$349,462.03	
Savings for Year 1936	364,253.10	
Surplus		$713,715.13
Total		$1,082,152.09

Summary

The Exchange is in sound financial condition with an excellent cash position. Its assets are of a high grade and can readily be turned into cash to meet any emergency which may arise.

Subscribers are afforded good treatment and all contractual obligations are taken care of promptly and in accordance with the provisions of the agreements.

The Attorney-in-Fact manages the affairs of the Exchange in an economical and efficient manner.

[fol. 402]

History

The Exchange was established in October 1913 under the name of Wholesale Grocery Subscribers at Warner Inter-Insurance Bureau. On January 1, 1926, the plan of operation was changed and the present title adopted. It was licensed by the Illinois Insurance Department December 29, 1925, and is now operating under an Act entitled:

"An Act concerning the business of reciprocal or inter-insurance." (Approved June 20, 1921.)

It is authorized to exchange insurance against loss or damage by fire, lightning, windstorm, hail, riot and civil commotion, explosion, aircraft damage, vandalism and malicious mischief, use and occupancy and springler leakage by and through Lansing B. Warner, Incorporated, Agent.

Each "principal" is required to execute an agreement called "Appointment of Agent."

Management

Lansing B. Warner, Incorporated, a corporation organized in 1912 under the laws of Illinois with a capital of $10,000.00 is the "Agent" whose powers are expressed in the "Appointment of Agent Agreement."

Advisors

For the benefit of the "Principal" as well as the "Agent", a council consisting of five members called "Advisors" exercises the authority granted and perform the duties imposed upon them by the appointment of "Agent Agreement" in connection with the management of the Exchange and supervision of the transactions and affairs of the members. These advisors, in conjunction with the "agent" have the custody of all monies and securities and full discretion in regard to their investment.

The advisors now serving are as follows:

E. G. Koonz, Tom Hale, Ben A. Morton, J. W. Herscher, W. B. Mackey.

Vacancies as they arise are filled by a vote of a majority of the remaining advisors and the record is filed in writing with the agent, each member being notified of any change of advisors.

Regular meetings of advisors are held on the third Monday of January and the last Monday of May and September in each year. Meetings are well attended.

Each advisor receives an annual compensation of $225.00 per year plus expenses for attending meetings.

Lansing B. Warner, Incorporated, referred to as "Agent" and the agreement between the "Agent" and "Principal" referred to as "Appointment of Agent" will be termed, in accordance with the language of the statutes, Attorney-in-Fact and power of attorney respectively. Likewise, the "Principal" will be hereafter referred to as subscriber in the following comments of this report.

Surety Bonds

A blanket fidelity bond in the amount of $100,000. issued by an authorized carrier, insures Lansing B. Warner, Lansing B. Warner, Incorporated; Canners Exchange Subscribers at Warners Inter-Insurance Bureau and Warner Re-[fol. 403] ciprocal Insurers against loss through larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, willful misapplication, or any fraudulent or dishonest act or acts on the part of any employee in a position of trust.

A forgery bond in the amount of $20,000.00 insuring Lansing B. Warner, Lansing B. Warner, Incorporated, Canners Exchange Subscribers at Warners Inter-Insurance Bureau and Warner Reciprocal Insurers against fraudulent signature and also insuring the personal accounts of Clarence R. Leland and John Eliot Warner in the amount of $2,000.00 each is issued by an authorized carrier.

Territory

The States in which Warner Reciprocal Insurers are authorized to exchange insurance are as follows:

Alabama	Maine	Oregon
Arkansas	Maryland	Pennsylvania
California	Michigan	South Carolina
Colorado	Minnesota	South Dakota
Florida	Mississippi	Tennessee
Idaho	Missouri	Texas
Illinois	Nebraska	Utah
Indiana	New York	Virginia
Iowa	North Carolina	Washington
Kansas	Ohio	Wisconsin
Kentucky	Oklahoma	

The exchange also holds a certificate of registry under the Foreign Insurance Companies Act of 1932, to operate in the Dominion of Canada and is licensed to transact insurance in the following Provinces:

Alberta, British Columbia, Manitoba, Ontario, Quebec, Saskatchewan.

Policy Forms and Rates

The Exchange issues one form of policy for insurance against loss or damage by fire and lightning. All other coverages are included by endorsement. All insurance is written at board rates.

Retention and Reinsurance

The Exchange retains the first $50,000.00 of a maximum $300,000.00 written on any one risk. The excess, above the net retention of the Exchange, is reinsured by an authorized carrier under the terms of a participating contract which provides for a 10 per cent participation by the Exchange.

Additional protection is had against excessive loss through a reinsurance agreement whereby the Exchange is reimbursed for losses and expenses in excess of 100 per cent of the earned guaranty dposit in any one year.

Scope of Examination

The last examination of this Exchange was made by the Illinois Department of Insurance as of December 31, 1933. The present examination covers the period from December 31, 1933 to and including December 31, 1936. The annual statements for 1934 and 1935 were checked through Ledger Assets and all transactions were traced through the books of original entry to the general ledger. In examining disbursements the cancelled checks were compared with supporting bills and the disbursement register. Extensive test checks were also made of Guaranty deposits, interest and other income.

Following is a financial statement showing Income and Disbursements for the year 1936 and Assets and Liabilities as of December 31, 1936 as determined by the examiners.

[fol. 404]

Amount of ledger assets (as per balance) December 31, of previous year $915,957.93

Income

	Gross Guaranty Deposits in connection with contracts written	Guaranty Deposits returned on contracts cancelled	Paid or Charged for Reinsurance Ceded	Total Deductions	Net Guaranty Deposits	
Fire	$936,684.18	$264,557.54	$17,145.23	$281,702.77	$654,981.41	
Tornado, Windstorm and cyclone	25,158.13	9,088.97	400.29	9,489.26	15,668.87	
Miscellaneous	4,425.77	1,591.72		1,591.72	2,834.05	
Totals	$966,268.08	$275,238.23	$17,545.52	$292,783.75	$673,484.33	$673,484.33

Gross interest on bonds, $16,951.87 less $9.74 accrued interest on bonds acquired during the year	$16,942.13	
Gross interest from all other sources:		
Interest Received on Past Due Accounts	6.40	
Interest on Reserve Fund	12,331.23	
Total interest		29,279.76
Total Income		$702,764.09
Amount carried forward		1,618,722.02

Disbursements

	Gross Amount Paid for losses	Deduct: Salvage	Deduct: Reinsurance	Total Deductions	Net Amount Paid Policyholders for losses	
Fire	$175,104.19	$3,226.15	$14,390.50	$17,616.65	$157,487.54	
Tornado, Windstorm and cyclone	714.16				714.16	
Totals	$175,818.35	$3,226.15	$14,390.50	$17,616.65	$158,201.70	$158,201.70

[fol. 405]

Loss adjustment expenses (Fire $5,642.05; Tornado, Windstorm and Cyclone $45.13)			$5,687.18
Agents' compensation		$141,669.91	
Taxes, licenses and fees:			
State taxes on premiums	$7,328.12		
Insurance Department	2,692.92		
Personal Property	1,041.81	11,062.85	
Legal expenses, excluding legal expenses on losses		6,585.67	
Premium for Subscribers' Contingent Liability Insurance		2,250.00	
Miscellaneous, itemized (a) Exchange and Collection Charges	$417.82		
(b) Audit Expense $846.50; Rating Bureau Fees, $5,871.33	6,717.83		
(c) Advisors' Fees and Expenses	3,054.40	10,190.05	171,758.48
			201,432.89
Savings to subscribers $234,215.38 less $32,782.49 credited to subscribers' reserves			55,482.09
Refunds of subscribers' reserves			12,331.23
Interest on Reserve Fund			23.13
Gross decrease, by adjustment, in book value of bonds			
Total Disbursements			$604,016.70
Balance			$1,013,805.32

Ledger Assets

Book value of bonds	$474,583.25	
Deposits in trust companies and banks not on interest	449,419.29	
Guaranty Deposits on Contracts effective subsequent to October 1 of current year	81,701.82	
Guaranty Deposits on Contracts effective prior to October 1 of current year	8,100.96	
Total Ledger Assets, as per Balance		$1,013,805.32

[fol. 406]

Non-Ledger Assets

Interest on bonds not in default	$3,889.77
Convention value of bonds over book value	65,966.75
Other non-ledger assets, viz: Salvage Recoverable	6,591.21
Gross Assets	$1,090,253.05

Deduct Assets Not Admitted

Guaranty Deposits on Contracts effective prior to October 1 of current year	$8,100.96
Total Admitted Assets	$1,082,152.09

Liabilities

	Total	Deduct Reinsurance	Net Unpaid Claims
Fire	$3,599.02	$943.22	$2,655.80
Tornado, Windstorm and Cyclone	125.00		125.00
Totals	$3,724.02	$943.22	$2,780.80

Estimated expenses of investigation and adjustment of losses			$173.70
Gross deposits (less authorized deductions) received and receivable upon all unexpired risks, $651,150.67; unearned guaranty deposits thereon		$997.70	350,380.05
Expenses, bills, accounts, fees, etc., due or accrued			
Estimated amount hereafter payable for federal, state or other taxes based upon the business of the year of this statement		8,191.71	9,189.41
All other liabilities, viz: Reinsurance Premiums Payable			5,913.00
Total amount of all liabilities		$349,462.03	$368,436.96
Reserve Fund		364,253.10	
Savings for year 1936			
Surplus			713,715.13
Total			$1,082,152.09

[fol. 407]

Comparative Statement

	1932	1933	1934	1935	1936
Amount of Ledger Assets December 31 of previous year	$877,782.02	$866,631.85	$826,698.11	$896,824.43	$915,957.93
Income					
Guaranty Deposits	502,957.65	548,851.50	597,114.47	634,503.20	673,484.33
Investments	22,687.50	28,662.92	19,687.50	16,937.50	16,942.13
Interest on Deposits in Banks	1,162.17	504.40	.....	.....	.....
Reserve Fund	82,631.62	78,377.13	27,207.51	43,508.11	12,331.23
Miscellaneous	.....	.....	470.30	3.11	6.40
Total Income	$609,438.94	$656,395.95	$644,479.78	$694,951.92	$702,764.09
Carried forward	$1,487,220.96	$1,523,027.80	$1,471,177.89	$1,591,776.35	$1,618,722.02
Disbursements					
Losses	146,633.51	191,659.81	183,519.67	234,994.08	158,201.70
Adjustment Expense	4,752.14	5,577.51	6,098.55	5,563.00	5,687.18
Administration Expense	106,593.19	114,693.54	123,608.18	131,607.09	141,669.91
Reserve Fund	95,796.15	92,156.93	44,620.85	44,581.84	55,482.09
Interest on Reserve Fund	13,210.31	11,518.66	13,153.46	12,570.68	12,331.23
Other Underwriting Expense	17,845.54	17,951.15	21,258.01	28,181.80	30,088.57
Unused Guaranty Deposits credited to Insurers and Agent	235,758.27	258,378.34	180,677.99	218,319.93	201,432.89
Investments	.....	4,393.75	1,416.75	.....	23.13
Total Disbursements	$620,589.11	$696,329.69	$574,333.46	$675,818.42	$604,916.70
Balance	$866,631.85	$826,698.11	$896,824.43	$915,957.93	$1,013,805.32

[fol. 408]

	1932	1933	1934	1935	1936
Assets					
Ledger	$866,631.85	$826,698.11	$896,824.43	$915,957.93	$1,013,805.32
Non-Ledger	30,127.82	13,930.24	33,563.72	54,829.34	76,447.73
Gross Assets	$896,759.67	$840,628.35	$930,388.15	$970,787.27	$1,090,253.05
Assets Not Admitted	10,361.81	5,584.48	1,405.07	10,095.73	8,100.96
Total Admitted Assets	$886,397.86	$835,043.87	$928,983.08	$960,691.54	$1,082,152.09
Liabilities					
Unpaid Claims	$6,540.00	$20,158.67	$27,038.25	$934.08	$2,780.80
Unearned Guaranty Deposits	201,114.30	226,889.14	263,656.70	300,643.93	350,380.05
Underwriting Expense	6,383.77	7,481.17	8,300.53	9,534.79	15,276.11
Total	$214,038.07	$254,528.98	$298,995.48	$311,112.80	$368,436.96
Surplus	672,359.79	580,514.89	629,987.60	649,578.74	660,905.12
	$886,397.86	$835,043.87	$928,983.08	$960,691.54	$1,029,342.08

fol. 409] Comments on Financial Statement

Income

Net Guaranty Deposits $673,484.33

The power of attorney agreement provides that no premium shall be charged for any policy of insurance, the consideration being the exchange of indemnity. At the issuance, the subscriber is required to deposit with the Attorney-in-Fact such a sum as the Attorney-in-Fact may deem proper, designated "Guaranty Deposit". This deposit is credited to the subscribers' individual account for the payment of losses and expenses.

Interest on Reserve Fund $12,331.23

Each year the Exchange determines the average interest yield on its investments and applies the rate determined to the balance of the Reserve Fund of each individual subscriber's account and then credits the amount thus determined to these respective accounts. This is merely a book entry and appears both as an Income and Disbursement item.

All other income items are regular and self-explanatory.

Disbursements

Compensation of Attorney-in-Fact $141,669.91

As provided in the Power of Attorney, a sum equal to twenty per cent of the total Guaranty Deposits is allowed the Attorney-in-Fact for defraying expenses of every kind in the execution and performance of his authority, except cost of adjustment and settlement of losses and expenses incident thereto, cost of reinsurance, counsel fees, costs and expenses of litigation, taxes, legal expenses and assessments, license fees, expense of fire patrol, expenses of rating and inspection bureaus and other expenses imposed by law, expenses of the Advisors and expenses incident to the investment and custody of funds and securities. This item represents the twenty per cent paid the Attorney-in-Fact as compensation for services previously enumerated.

Premiums for Subscribers' Contingent Liability Insurance $2,250.00

This amount is the premium paid on a contract of reinsurance limiting the subscribers' contingent liability.

Savings to Subscribers $201,432.89

The gross item of $234,215.38 represents savings on policies in force during 1935 plus 1936 savings of $6,559.20 returned to Subscribers withdrawn during 1936. As an additional compensation for services rendered, the Attorney-in-Fact receives one-fifth of the credit balance of the Subscriber at the end of each calendar year plus a like ratio of any savings returned during the year to withdrawn subscribers. Of the $6,559.20, one-fifth or $1,311.87 was paid the Attorney-in-Fact and $5,247.33 was returned to subscribers who withdrew during 1936.

The savings for 1935 on policies in force during 1935 totaling $227,656.18 was distributed in the following manner in January, 1936: one-fifth or $45,531.24 was paid the Attorney-in-fact, $32,782.49 was credited to subscribers' individual reserve fund accounts and the balance of $149,342.45 was returned to subscribers.

[fol. 410] Each year the Advisors determine an amount of savings to be credited to the subscribers' reserves. The amount set aside from 1935 savings to be credited to the subscribers' individual reserves was $32,782.49.

Refunds of Subscribers' Reserves $55,482.09

The power of attorney provides in case at any time the total reserve fund of the subscriber exceeds an amount which is one and one-half times the average annual Guaranty Deposits of the subscriber or such lesser amount as the Attorney-in-Fact with the approval of a majority of the Advisors considers sufficient, the excess will be remitted to the subscribers. This item represents said excess reserves refunded as specified plus reserves refunded to subscribers who have withdrawn during the year.

Ledger Assets

Book Value of Bonds $474,583.25

All bonds owned consist of United States Treasury bonds and at the date of this examination all bonds are carried at par value on the books of the exchange. The Exchange has followed the practice of writing down to par all investments purchased at a premium and distributing the loss thus taken to the individual subscribers' accounts at the time of purchase. However, bonds purchased below par are not appreciated to par value. For the purpose of this report, bonds have been shown at convention values. The excess

f Convention over book value, the amount of which is 5,966.75, has been included as a non-ledger asset in the oregoing financial statement.

The deposit with the Illinois Insurance Department in e amount of $50,000.00 and the deposit held in compliance ith Canadian laws, by the National Trust Company, imited, Toronto, Canada, in the amount of $1,000.00 were erified by correspondence. All other bonds were exam- ed at the First National Bank of Chicago, which acts as stodian of securities for the subscribers under a trust greement.

Accrued interest in the amount of $3,889.77 has been al- wed as a non-ledger asset in the foregoing financial state- ent.

eposits in trust companies and banks not on interest $449,419.29

This amount was verified by the usual bank verification tters.

aranty Deposits in Course of Collection $89,802.78

A verification of this item was made by a detailed analysis individual subscribers' accounts. Of the above amount, ,100.96 represents deposits on policies dated prior to tober 1, 1936. The latter has been deducted as a non- mitted asset.

In the event a subscriber fails to pay his Guaranty De- sit within a reasonable time, or if a subscriber withdraws thout paying said deposit, the amount of the deposit due charged to his Reserve Fund account before the Exchange turns savings to the subscriber.

l. 411] Salvage Recoverable $6,591.21

This amount has been allowed as a non-ledger asset inas- uch as the Exchange has recovered this amount to date claims which were incurred prior to December 31, 1936.

Liabilities

paid Losses and Claims $2,780.80

The amount of reserve set up for liquidation of claims presents the actual cost of the losses inasmuch as all ims open and unpaid December 31, 1936 were paid on or

before May 4, 1937. The Exchange had ten unpaid claims as of December 31, 1936.

Adjustment Expense $173.70

This amount was disbursed subsequent to December 31, 1936 in the liquidation of all claims open and unpaid as of that date.

Unearned Guaranty Deposits $350,380.05

The unearned Guaranty Deposit reserve was computed in accordance with the Illinois statute. Yearly business was set up on a 50 per cent basis and all longer term business was computed on a pro rata basis. Allowance was made for authorized deductions.

Reserve Fund $349,462.03

In accordance with provisions of the Power of Attorney certain amounts are taken from savings as determined at the end of each calendar year and credited to a fund called the Subscribers' Reserve Fund. As of December 31, 1936, this fund aggregated $349,462.03 on all insurance in force. The purpose of this fund is to guarantee any liability on the part of the subscribers to the Exchange in excess of guaranty deposits.

Savings for year 1936 ..... $364,253.10

The records of the Exchange are maintained on an accrual basis. Monthly adjustments, based on computation by the Exchange, are made to ledger accounts of liability items. In computing the savings to subscribers at the end of each calendar year, the Exchange treats all assets as admitted items. On the basis of the computation employed by the Exchange, the total savings for 1936 on insurance in force as of December 31, 1936 was $264,083.75.

The foregoing financial statement was compiled following the usual conventoin form. In this manner, the savings to subscribers were $364,253.10 as reflected above.

As commented in foregoing pages of this report, the Attorney-in-Fact receives one-fifth of the savings to the subscriber as determined by the Exchange at the end of each calendar year on the current year's business. On the basis of the foregoing financial statement, $72,850.62 was due the Attorney-in-Fact. However, due to the manner of computa-

on used by the Exchange, $52,810.01 was paid the At-
orney-in-Fact and the balance of savings were returned to
he subschibers in January, 1937.

Examiners O. W. Meriwether, F. C. Hoff and J. J. Shoaff
f the Illinois Insurance Department assisted in the work
f this examination.

(Here follows 1 photolithograph, side folio 412)

BLANKS

PLAINTIFF'S' EXHIBIT 19

STATE OF ILLINOIS
DEPARTMENT OF INSURANCE

I, the undersigned, Director of Insurance of the State of Illinois, do hereby

certify that the annexed instrument is a full, true and correct copy of

REPORT OF EXAMINATION OF
CANNERS EXCHANGE SUBSCRIBERS AT WARNER INTER INSURANCE BUREAU
CHICAGO

DATED JUNE 19, 1937 AND

ORDER OF DIRECTOR OF INSURANCE
APPROVING, ADOPTING AND FILING
REPORT AS AN OFFICIAL RECORD

UNDER DATE OF
SEPTEMBER 24, 1937

now on file in and forming a part of the records of this department.

In Testimony Whereof, *I hereto set my hand and cause to be affixed the Seal of my office.*

now on file in and forming a part of the records of this department.

In Testimony Whereof, *I hereto set my hand and cause to be affixed the Seal of my office.*

Done at the City of Springfield, this 11th *day of* October *A. D.* 1937.

Ernest Palmer
Director of Insurance

UNITED STATES OF AMERICA,
STATE OF ILLINOIS, } ss.
Office of SECRETARY OF STATE,

I, EDWARD J. HUGHES, Secretary of State of the State of Illinois, hereby certify that

ERNEST PALMER

is now, and has been since THE 1ST day of JULY A. D. 1933

DIRECTOR OF INSURANCE

State of Illinois duly commissioned and qualified, and that as such, full faith and credit is, and ought to be, given to his official attestations.

Director of Insurance

UNITED STATES OF AMERICA,
STATE OF ILLINOIS,
Office of SECRETARY OF STATE, } ss.

I, EDWARD J. HUGHES, Secretary of State of the State of Illinois, hereby certify that

ERNEST PALMER

is now, and has been since THE 18T day of JULY A. D. 1933

DIRECTOR OF INSURANCE

State of Illinois

duly commissioned and qualified, and that as such, full faith and credit is, and ought to be, given to his official attestations.

IN TESTIMONY WHEREOF, I hereto set my hand and cause to be affixed the Great Seal of State.

Done at the City of Springfield, this 14TH day

of MARCH A. D. 19 40

Edward J. Hughes

Secretary of State.

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(8746—2M—11-32)

[fol. 413] State of of Illinois
Henry Horner, Governor,
Department of Insurance,
Springfield

Ernest Palmer, Director.

The attached report of examination as of December 31, 1936 of the condition and affairs of the Canners Exchange Subscribers at Warner Inter Insurance Bureau, Chicago, was recently completed by duly qualified examiners of this Department.

Due consideration has been given to the comment of the examiners regarding the operation of the exchange and its financial condition as reflected from the report. The report is hereby as of this date approved, adopted and filed and made an official record of this Department.

Department of Insurance, Ernest Palmer, Director of Insurance.

Dated this 24th day of September, 1937.

[fol. 414] I hereby certify that the attached report of examination dated June 19, 1937 shows the condition and affairs of the Canners Exchange Subscribers at Warner Inter Insurance Bureau, Chicago, as of December 31, 1936. This report has been reviewed and is hereby approved.

Lorenz Jost, Chief Examiner.

Dater this 24th day of September, 1937.

[fol. 415] June 19, 1937.

Honorable Jess G. Read, Chairman, Committee on Examinations, National Convention of Insurance Commissioners, Oklahoma City, Oklahoma.

Honorable Ernest Palmer, Director of Insurance, Springfield, Illinois.

Honorable John J. Holmes, State Auditor and Ex Officio Commissioner of Insurance, Helena, Montana.

Honorable Wesley S. Hanna, Insurance Commissioner, Baltimore, Maryland.

Pursuant to instructions contained in Fire Warrant No. 1, dated May 24, 1937, an examination has been made of the

affairs of the Canners Exchange Subscribers at Warner Inter-Insurance Bureau, 540 North Michigan Avenue, Chicago, Illinois, and a detailed report thereof follows.

Raymond G. Lonnon, Examiner, Representing the State of Illinois. E. E. Grabow, Special Examiner, Representing the State of Montana. A. M. Payne, Examiner, Representing the State of Maryland.

[fol. 416] Examination Report

Date: June 9, 1937.

No. of Warrant: #1 Fire, Dated May 24, 1937.

Examination of: Canners Exchange Subscribers at Warner Inter Insurance Bureau, 540 N. Michigan Avenue, Chicago, Illinois.

Type of Organization: Reciprocal.

Licensed: December 27, 1907, in accordance with "An Act concerning the business of reciprocal or inter-insurance." (Approved June 20, 1921.)

Business Written: Fire and Lightning, Windstorm and Hail, Riot and Civil Commotion, Explosion, Aircraft Damage, Vandalism and Malicious Mischief.

Date of last examination: December 31, 1933.

Period covered by this examination: From December 31, 1933 to and including December 31, 1936.

Total Admitted Assets		$3,772,774.60
Total Liabilities		$769,668.16
Reserve fund	$463,775.00	
Surplus reserve	1,269,632.00	
Surplus	1,269,699.44	
Surplus as regards subscribers		$3,003,106.44
Total		$3,772,774.60

Summary

The cash position of the Exchange is excellent and all investments are of a high grade having an average yield of 3.4% for the period under examination.

The Exchange is efficiently managed as is evident by its sound financial condition.

Subscribers are afforded good treatment and contractual obligations are fairly discharged.

[fol. 417] History

The exchange was organized in December, 1907, and is now operating under an act entitled:

"An Act concerning the business of reciprocal or inter-insurance", Approved June 20, 1921.

It is authorized to exchange insurance against loss or damage by fire and lightning, windstorm and hail, riot and civil commotion, explosion, air craft damage, vandalism and malicious mischief, use and occupancy and sprinkler leakage by and through Lansing B. Warner, Incorporated, Attorney-in-Fact. However, the principal lines written are fire and lightning on properties of the canning industry and allied interests.

Management

The Attorney-in-Fact for the exchange is Lansing B. Warner, Incorporated, a corporation organized in 1912 under the laws of the State of Illinois, with a capital of $10,000.00.

The officers of the Attorney-in-Fact are as follows:

President and Treasurer, Lansing B. Warner.
Executive Vice-President and Secretary, Clarence R. Leland.
Vice-President and Assistant Secretary, John Eliot Warner.

Advisory Committee

For the purpose of protecting the rights of all parties in interest an Advisory Committee consisting of five members, who are individual subscribers, or members of firms or officers of corporations which are subscribers, is elected annually by the subscribers. The president of the Attorney-in-Fact Corporation is ex officio a member of this committee and acts as its Secretary.

This committee performs the duties imposed upon it by the power of Attorney executed by the subscribers and it is vested with the powers to adopt such rules and regulations consistent with the provisions contained therein. It is charged with the responsibility of keeping all monies and securities and has full discretion and authority in regard to investment of the funds and the disbursement of same as specified in the power of attorney.

In the election of members of the advisory committee, except the Secretary, a written notice to nominate and vote for members of this committee is sent to each of the subscribers by the Attorney, on, or within five days after the first day of December of each year. The five qualified nominees having the highest number of votes, received by the Attorney up to twelve o'clock noon on the twentieth day of December, are elected members of the Advisory Committee to serve for one year and until their successors are elected and qualified. Each subscriber has as many votes as he has dollars of Reserve Fund deposit, on the first day of December.

Members of the Advisory Committee now serving are:

A. M. Lester, Chairman.
Edward F. Trego, Vice-Chairman.
Frank Van Camp.
Wm. R. Roach.
Harry L. Cannon.
Lansing B. Warner, Secretary.

[fol. 418] Meetings of the Advisory Committee are held on the third Thursday of January and May and the last Thursday of September each year. Each member receives expenses for attending meetings of this Committee. The meetings are well attended.

Surety Bonds

Under a suretyship bond issued by an authorized company Lansing B. Warner, president of the Attorney-in-Fact, is bonded in the sum of $50,000.00 in favor of Lansing B. Warner, Incorporated. There is an indemnity agreement on file on behalf of Lansing B. Warner, Incorporated, in favor of the subscribers and secured by the above mentionad suretyship bond.

A blanket fidelity bond in the amount of $100,000.00 issued by and authorized company, insures Lansing B. Warner, Lansing B. Warner Incorporated, Canners Exchange Subscribers at Warner Inter Insurance Bureau and Warner Reciprocal Insurers against loss through larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, wilful misapplication, or any fraudulent or dishonest act or acts on the part of any employee in a position of trust.

Territory

The Exchange is authorized to exchange insurance in the following States:

Alabama	Mississippi
Arkansas	Missouri
California	Nebraska
Colorado	New York
Florida	Ohio
Idaho	Oklahoma
Illinois	Oregon
Indiana	Pennsylvania
Iowa	Tennessee
Kansas	Texas
Kentucky	Utah
Maine	Virginia
Maryland	Washington
Michigan	Wisconsin
Minnesota	

In Canada, the Canners Exchange Subscribers at Warner Inter-Insurance Bureau are authorized in the Provinces of British Columbia, Ontario and Quebec and also hold a Certificate of Registry under the Foreign Insurance Companies Act of 1932 to operate in the Dominion of Canada.

Insurance exchanged in states or territories other than those listed is accepted by mail or voluntary application.

Policy Forms and Rates

The Exchange issues only one policy, a standard fire form, all other coverages are written by endorsement. Bureau rates are used as a basis for the Expense and Guarantee fund deposits on all risks. Each applicant for insurance must sign the Power of Attorney agreement. New subscribers are accepted subject to the approval of the advisory committee and recommendation of three subscribers.

Retention and Reinsurance

The maximum fire risk written is $1,000,000.00. The excess above $140,000.00 is reinsured under two contracts which are commented on immediately following.

The Exchange's net retention on any one loss is $140,000.00 and under the terms of the first excess loss contract,

which is issued by an authorized carrier, the Exchange is a co-insurer to the extent of 10% of limits above $140,000.00 up to $500,000.00.

A second excess loss contract provides the Exchange with additional reinsurance, of all liability on any one loss, in excess of $500,000.00 up to $1,000,000.00.

[fol. 419] Excess windstorm losses are reinsured as follows:

The Exchange retains the first $140,000.00. On limits above $140,000.00 to $640,000.00 the Exchange is a co-insurer to the extent of 10%.

The windstorm reinsurance contract provides that if losses accruing during the term of the policy, which is issued for one year, exceed $900,000.00 in the aggregate the contract will be cancelled.

The maximum windstorm risk written is $640,000.00.

Scope of Examination

The last examination of this Exchange was made by the Illinois Department of Insurance as of December 31, 1933. The present examination covers the intervening period to and including December 31, 1936. Annual statements for 1934, 1935 were checked through Ledger Assets and all transactions for the years 1934, 1935 and 1936 were traced through the books of original entry to the general ledger. Test checks were made of expense and guarantee fund deposits, interest and other income.

Following is a financial statment showing Income and Disbursements for the year 1936 and Assets and Liabilities as of December 31, 1936:

Amount of ledger assets (as per balance) December 31 of previous year						$3,286,059.42
	Income	Deduct				
	Gross Expense and Guarantee Fund Deposits in connection with Contracts written	Expense and Guarantee Fund Deposits on Cancellations	Paid or charged for reinsurance ceded	Total Deductions	Net Expense and Guarantee Fund Deposits	
Fire	$2,498,226.66	$867,044.07	$43,430.96	$910,475.03	$1,587,751.63	
Tornado, windstorm and cyclone	19,613.96	6,781.04	428.61	7,209.65	12,404.31	
Miscellaneous	4,479.18	2,131.11	.....	2,131.11	2,348.07	
Totals	$2,522,319.80	$875,956.22	$43,859.57	$919,815.79	$1,602,504.01	$1,602,504.01
Gross interest on bonds $66,943.75 less $2,555.55 accrued interest on bonds acquired during the year					64,388.20	
Gross interest on deposits in trust companies and banks					12.27	
Gross interest from all other sources (give items and amounts):						
Interest on Surplus Reserve					40,965.96	
Total Interest						105,366.43
From other sources (give items and amounts):						
Reserve Fund Deposits						53,871.00
TOTAL INCOME						$1,761,741.44
Amount carried forward						$5,047,800.86

Disbursements

	Gross Amount Paid for Losses	Deduct Salvage	Net Amount Paid Policyholders for Losses	
Fire	$303,049.68	$42,713.28	$260,336.40	
Tornado Windstorm and Cyclone	769.62	.....	769.62	
Totals	$303,819.30	$42,713.28	$261,106.02	$261,106.02

FINANCIAL STATEMENT—Continued

[fol. 421]

Loss adjustment expenses (Fire $3,354.60; Tornado, Windstorm and Cyclone $1.90)			$3,356.50
Taxes, licenses and fees:			
State Taxes on contracts written	$19,590.12		
Insurance Department	1,367.37		
Personal Property taxes	1,442.12		
		$22,399.61	
Advisory Committee Expense		2,924.16	
Legal expenses, excluding legal expenses on losses		13,741.93	
Audit Expense		849.99	
Miscellaneous, itemized:			
(a) Paid to Attorney-in-Fact	$423,320.72		
(b) Rating Bureau Expense	13,090.72		
(c) Exchange and Collection Charges	694.57	$437,106.01	$477,021.70
Savings to subscribers $748,204.98 less $147,279.00 credited to subscribers' reserves			600,925.98
Refunds of subscribers' reserves or deposits of reserves			102,740.31
Interest on Surplus Reserve			40,965.96
Gross decrease, by adjustment, in book value of bonds			11,562.50
Total Disbursements			$1,497,678.97
Balance			$3,550,121.89

Ledger Assets

Book value of bonds	$2,275,000.00	
Deposits in trust companies and banks not on interest	1,123,938.89	
Expense and Guarantee Deposits due but not yet made on contracts effective subsequent to October 1 of current year	146,375.93	
Expense and Guarantee Deposits due but not yet made on contracts effective prior to October 1 of current year	4,807.07	
Total ledger Assets, as per Balance		$3,550,121.89

[fol. 422]

Non-Ledger Assets

Interest Accrued on bonds not in default		$16,709.78
Convention value of bonds over book value		210,750.00
Gross Assets		$3,777,581.67

Deduct Assets Not Admitted

Expense and Guarantee Deposits due but not yet made on contracts effective prior to October 1 of current year		4,807.07
Total Admitted Assets		$3,772,774.60

Liabilities

Losses and claims:		
Fire		$22,300.68
Estimated Expenses of investigation and adjustment of losses		217.35
Gross Expense and Guarantee Fund Deposits (less reinsurance) received and receivable upon all unexpired risks $1,429,925.63; unearned Expense and Guarantee Fund Deposits thereon		714,962.82
Expenses, bills, accounts, fees, etc., due or accrued		886.98
Estimated amount hereafter payable for federal, state or other taxes based upon the insurance of the year of this statement		18,338.39
All other liabilities, viz:		
Reinsurance Premiums Payable		12,961.94
Total amount of all Liabilities		$769,668.16
Reserve Fund	$463,775.00	
Surplus Reserve	1,269,632.00	
Surplus	1,269,699.44	
Surplus as regards Subscribers		3,003,106.44
Total		$3,772,774.60

[fol. 423] COMPARATIVE STATEMENT

	1932	1933	1934	1935	1936
Amount of Ledger Assets December 31, previous year	$2,830,162.95	$2,786,635.88	$2,640,098.60	$2,917,992.37	$3,286,059.42
Income					
Net Expense & Guarantee Fund Deposits written	$1,187,885.34	$1,135,871.06	$1,396,636.49	$1,672,179.02	$1,602,504.01
Interest on Investments	87,280.74	97,736.13	72,275.00	77,213.46	64,388.20
Reserve Fund	19,110.00	27,816.00	65,968.00	92,281.00	53,871.00
Surplus Reserve	163,854.22	188,691.08	165,580.70	180,870.60	188,244.96
Miscellaneous	—0—	201.50	3,327.43	—0—	12.27
Total Income	$1,449,130.30	$1,450,315.77	$1,703,787.62	$2,022,544.08	$1,909,020.44
Carried Forward	$4,279,293.25	$4,236,951.65	$4,343,886.22	$4,940,536.45	$5,195,079.86
Disbursements					
Losses	$271,325.08	$223,762.06	$161,979.54	$311,017.14	$261,106.02
Investigation and Adjustment of Claims	2,101.32	6,089.09	14,410.13	5,056.20	3,356.50
Compensation to Attorney-in-Fact	296,019.07	282,455.84	341,626.55	419,739.36	423,320.72
Interest on Surplus Reserve	35,281.01	35,742.91	41,487.31	39,314.93	40,965.96
Surplus Reserve	120,692.73	173,989.70	181,146.65	95,488.12	69,425.31
Reserve Fund	57,475.00	50,646.00	26,567.00	20,968.00	33,315.00
Unused Expense & Guarantee Fund Deposits returned	659,355.23	776,436.55	625,057.67	713,980.80	748,204.78
Other Underwriting Expense	44,066.50	32,505.90	33,619.00	47,412.48	53,700.98
Miscellaneous	6,341.43	15,225.00		1,500.00	11,562.50
Total Disbursements	$1,492,657.37	$1,596,853.05	$1,425,893.85	$1,654,477.03	$1,644,957.97
Balance	$2,786,635.88	$2,640,098.60	$2,917,992.37	$3,286,059.42	$3,550,121.89

COMPARATIVE STATEMENT—Continued

Assets

	1932	1933	1934	1935	1936
Ledger Assets	$2,786,635.88	$2,640,098.60	$2,917,992.37	$3,286,059.42	$3,550,121.89
Non-Ledger Assets	120,481.36	34,854.98	104,589.18	119,747.30	227,459.78
Gross Assets	$2,907,117.24	$2,674,953.58	$3,022,581.55	$3,405,806.72	$3,777,581.67
Assets not Admitted	87,746.94	13,236.41	6,688.79	3,521.16	4,807.07
Total Admitted Assets	$2,819,370.30	$2,661,717.17	$3,015,892.76	$3,402,285.56	$3,772,774.60

[fol. 424]

Liabilities

Losses and Claims	$4,210.26	$6,485.00	$21,353.51	$16,675.00	$22,300.68
Unearned Expense and Guarantee Fund Deposits	507,872.79	471,333.90	588,597.51	714,565.02	714,962.82
Underwriting Expenses	11,456.76	13,264.58	18,376.86	30,818.07	32,404.66
Total Liabilities	$523,539.81	$491,083.48	$628,327.88	$762,058.09	$769,668.16
Surplus	2,295,830.49	2,170,633.69	2,387,564.88	2,640,227.47	3,003,106.44
	$2,819,370.30	$2,661,717.17	$3,015,892.76	$3,402,285.56	$3,772,774.60

[fol. 425] Comments on Financial Statement

Income

Net Expense and Guarantee Fund Deposits . . $1,602,504.01

The power of attorney agreement provides that no premium shall be charged for any policy of insurance, the consideration being the exchange of indemnity. At the issuance of the policy the subscriber is required to deposit with the attorney such a sum as the attorney may deem proper designated "Expense and Guarantee Fund". This deposit is credited to the subscriber's individual account for the payment of losses and expenses.

The above amount represents the net deposits written during 1936.

Reserve Fund $53,871.00

In addition to the Expense and Guarantee Fund Deposit, each subscriber makes a Reserve Fund Deposit, the amount of which is based on the amount of insurance contracted for by the subscriber, being $2.00 for each one thousand of insurance carried. Fluctuations in the amount of insurance carried increases or decreases the amount of the Reserve Fund deposit accordingly. The Reserve Fund Deposit or Deposits are credited to the separate individual accounts of the subscribers under the title "Reserve Fund". The above item represents the amount so derived and credited to the subscribers accounts.

In case the Reserve Fund deposits of the Subscriber exceeds the average of $2.00 per thousand the excess amount is returned to the subscriber. However, if the Reserve Fund does not equal $2.00 per thousand the subscriber is billed for an amount sufficient to maintain the fund as outlined. Included under Disbursements in the foregoing financial statement is an amount of $102,740.31 captioned, "Refunds of subscribers' reserves or deposits or excess reserves" of which $33,315.00 represents Reserve Fund deposits returned and $69,425.31 represents Surplus Reserve Excess returned to subscribers.

Interest on Surplus Reserve $40,965.96

Each year the Exchange determines the average interest yield on its investments and applies the rate determined to the balance of the Surplus Reserve Fund of each individual *subscriber* subscriber's account and then credits the amount

thus determined to these respective accounts. This is merely a book entry and appears both as Income and Disbursement items.

All other Income items are regular and self-explanatory.

Disbursements

Compensation paid to Attorney-in-Fact $423,320.72

As provided in the power of attorney agreement, a sum equal to twenty per cent of the total expense and guarantee fund deposits of the subscriber is allowed the attorney as consideration for defraying all expenses of every kind, except the payment of losses, expenses incidental to the adjustment and settlement of losses (other than adjuster's fees and expenses), counsel fees, costs and expense of litigation, taxes, legal expense and assessments, license fees, expenses of fire patrol, fees and expenses of advisory committee and expenses incidental to the investment and custody of funds and securities.

Savings to Subscribers $600,925.98

The gross item of $748,204.98 represents savings for 1935 on policies in force during 1935 plus 1936 savings of $11,809.98 returned to subscribers withdrawn during the year. The item of $147,279.00 represents the 20% of 1935 savings that [fol. 426] was retained and credited to the individual subscribers Surplus Reserve accounts. The net disbursement item, $600,925.98 represents the cash refund of 1935 savings in the amount of $589,116.00, returned in January 1936, plus $11,809.98 which represents 1936 savings returned to withdrawn subscribers during 1936.

The Exchange has returned $12,243.207.12 in savings to subscribers since organization.

All other disbursement items are regular and self-explanatory.

Ledger Assets

Book Value of Bonds $2,275,000.00

All bonds owned consist of United States Treasury bonds only and at the date of this examination are carried at par value on the books of the Exchange. The Exchange has followed the practice of writing down to par all investments purchased at a premium and distributing the loss thus taken to the individual subscriber's accounts at the time of pur-

chase. However, bonds purchased below par are not appreciated to par value.

For the purpose of this report bonds have been shown at convention values. The excess of convention over book value, the amount of which is $210,750.00, has been included as a non-ledger asset in the foregoing financial statement.

The deposit with the Illinois Insurance Department in the amount of $50,000.00 and the deposit held in compliance with Canadian laws, by the National Trust Company, Limited, Toronto, Canada, in the amount of $25,000.00, were verified by correspondence. All other bonds were examined at the First National Bank of Chicago, which acts as custodian of securities for the subscribers under a trust agreement.

Accrued interest in the amount of $16,709.78 has been allowed as a non-ledger asset in the foregoing financial statement.

Deposits in trust companies and banks not on Interest $1,123,938.89

This amount was verified by the usual bank verification letters.

Expense and Guarantee Fund Deposits in Course of Collection $151,183.00

A verification of this item was made by a detailed analysis of individual subscribers' accounts. Of the above amount, $4,807.07 represents deposits on policies dated prior to October 1, 1936. The latter has been deducted as a non-admitted asset.

In the event a subscriber fails to pay his Expense and Guarantee Fund deposits and withdraws without paying such deposits, the amount of the deposits due is deducted before any funds are returned to the subscriber.

[fol. 427] Liabilities

Unpaid Losses and Claims $22,300.68

Claims were valued on a case basis by an individual review of all outstanding claims. All claims open December 31, 1936, with the exception of three cases, were paid on or before June 1, 1937.

Adjusting Expense $217.35

The Exchange did not include any reserve for this item in their financial statement. However, it was found that the Exchange has disbursed this amount, as of June 1, 1937, in connection with settlement of losses.

Unearned Expense and Guarantee Fund Deposits	$714,962.82

Inasmuch as all policies are written for a term of one year or less, the unearned reserve was computed by applying the fifty per cen- unearned factor to the total expense and guarantee fund deposits in force December 31, 1936, less authorized deductions.

All other liabilities appearing in the foregoing financial statement were computed by the examiners. These are self-explanatory and require no comment.

General Comments

A schedule showing the funds making up the Surplus of the Exchange before the distribution of savings to Subscribers is as follows:

Reserve Fund	$ 463,775.00
Surplus Reserve Fund	1,269,632.00
Surplus (80% of savings to be distributed)	1,269,699.44
Surplus as regards subscribers (Before distribution of savings to subscribers)	$3,003,106.44

The subscriber's liability under any policy issued is that proportionate share of insurance granted by such policy as the total Reserve Fund deposit of each subscriber bears to the combined Reserve Fund deposits of all subscribers. Each subscriber assumes a proportion of each and every policy in force during the period that his insurance is in force. The liability of the subscriber on any one risk is limited to five times the amount of the Subscriber's Reserve Fund Deposit.

The Exchange maintains individual accounts for each subscriber and the net balance of each subscriber's account represents his proportionate share of the total surplus of the Exchange.

At the time a subscriber receives a contract of insurance he may establish a Reserve Fund equal to $2.00 for each

thousand dollars of insurance he has in force. The establishing of a Reserve Fund is not compulsory, however, since all profits are distributed on the basis of the Reserve Fund, a subscriber does not participate in the savings of the Exchange if he does not maintain a Reserve Fund. Each subscriber must pay Expense and Guarantee Fund deposits in addition to his Reserve Fund. The Expense and Guarantee Fund deposits represent premiums based on "Bureau" rates.

[fol. 428] A Surplus Reserve Fund is also maintained for each subscriber. The books of the Exchange are kept on an accrual basis and each month all estimated incurred liabilities are charged and all income earned credited. Each year 20% of the net earnings on savings are withheld and credited to the subscribers' Surplus Reserve Fund until said fund reaches a maximum of five times the Reserve Fund deposit of the subscriber. The remaining 80% of the net earnings, is distributed in cash immediately after the close of the year. After this 80% is distributed in cash the aggregate balance of the individual subscriber's Surplus Reserve Fund accounts and Reserve Fund accounts represents the total surplus of the Exchange.

Messrs. O. W. Meriwether, F. S. Hoff and J. J. Shoaff of the Illinois Department of Insurance assisted in the examination.

(Here follow 3 photolithographs, side folios 429-431)

PLAINTIFF'S EXHIBIT 21

THE CANNER

Established 1905

Advertising Rates

Advertising rates will be furnished on application.

Advertising forms close on Monday. Where proof is desired, copy is required a week in advance.

Published every Thursday by

The Canner Publishing Company

222 North Wabash Avenue, Chicago

Subscription Rates

United States, its possessions, Mexico and Canada, $1.00 per year.

United Kingdom, Europe, and all countries in the Universal Postal Union, $3.00 postage prepaid.

Single copies, 10 cents.

JAMES J. MULLIGAN
Editor

Entered as second-class matter, March 21, 1905, at the Post Office at Chicago, Illinois, under Act of March 3, 1879

GEORGE SHAW
Business Manager

Vol. XLII No. 9 CHICAGO, THURSDAY, MARCH 2, 1916 Whole No. 1,101

March 10th will be Canned Salmon Day. Buy a can.

* * *

Acreage now becomes the absorbing question with the canner.

* * *

General business throughout the United States has attained tremendous momentum.

* * *

Quality shouldn't be expected to stand alone. It needs the support of steady advertising.

* * *

THE CANNER Special Convention Issue gives the proceedings at Louisville under ONE cover.

* * *

In the packing end of the canning business there are lots of people who know too much and not enough.

* * *

We are proud of the 1916 Convention Number of THE CANNER. It is a publication worthy of the great canning industry. Keep your copy; you will need it during the year for reference purposes.

* * *

Send THE CANNER reports on your sales, stating quantity, grade, size of containers, etc. If actual prices realized on sales of canned foods are wanted, we will gladly give the trade figures furnished by the canners themselves, if they will do their part. No names will be used—all reports treated as absolutely confidential.

The suggestion of the "National Food Magazine" that we "Have more talk about the deliciousness of canned foods and less talk about the containers," will, we hope, be adopted by everybody identified with the canning industry. Canned foods are the most wholesome, most sanitary, most economical food obtainable. That's the thought to impress upon the public mind.

* * *

Both Dun and Bradstreet report an impressive volume of domestic trade in their last weekly reviews of business conditions throughout the country. Dun's says in part: "The prominent activities were favored by the milder weather and the volume of commerce now stands out more distinctly in its impressive progress. This is seen in notably high aggregate payments through the banks, enlarging discount operations, wider investment, and extensive planning for industrial needs and other improvements." Bradstreet's remarks that "Trade as well as industry still moves at a brisk pace. Prices continue to advance, deliveries of raw and finished materials are complained of as slow, railway traffic is congested, supplies of money are plethoric, and collections are good. Weekly bank clearing, $3,956,241,000."

Goodlett & Belles Brokerage Co.
Kansas City, Missouri
We travel Kansas and Missouri
Canned Foods and Dried Fruit

THE W. W. BARNARD CO.—CHICAGO
Growers of Select and Pedigreed SEEDS
PEAS, BEANS, CORN, TOMATOES, Etc., Spots and Futures
Telephone Franklin

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Telephones, Franklin 633-634-635
231-235 W. Madison St.

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Telephone, Central 790 and 791 325 North Clark St., Chicago, Ill.

314A

SECOND SESSION

Tuesday Morning, February 8th, 1916

TUESDAY morning's session, the second of the joint meetings, was called to order at 10 o'clock by National President Geo. N. Numsen, Baltimore, who said: "The convention will please come to order. We have been delayed somewhat, for which I am very sorry, and I will proceed at once to business by asking Mr. Lansing B. Warner to address us on the subject of cooperative insurance." Mr. Warner read as follows

ADDRESS OF LANSING B. WARNER ON COOPERATIVE INSURANCE.

Eight years ago, at the first annual convention of the National Canners' Association, I had the privilege of presenting to you for the first time the subject of "Cooperative or Inter-Insurance for the Canning Industry." At that time we were just beginning to issue policies and what I said was more or less in the nature of a prospectus, setting forth what had been accomplished by other inter-insurance offices and mutual companies and explaining the general laws of insurance.

At this convention it is very pleasing to be able to report that eight years' experience has proven all of the statements made at that time to be correct and that results have fully proven the wisdom of your cooperating at Canners' Exchange.

Canners Exchange Tried and Successful.

You as subscribers now have in Canners' Exchange a tried plant, which stands in the forefront of inter-insurance offices in the country. It has been successful. It has proven a money saver and a benefit to the industry in many ways. It is another proof of the benefits of cooperation, as compared with individual effort.

Please bear in mind that Canners' Exchange is operated exclusively in the interest of the canning industry and that the efforts of your management are devoted to the general good and are not confined exclusively to the saving of a few dollars in the cost of your insurance each year.

Service.

We believe that our efforts have saved thousands of dollars by preventing fires through suggestions which have reduced the hazard and, therefore, the number of fires.

We are gradually improving the forms under which your insurance is written, thus making the insurance cover, as it should cover, so that when you have a loss you get your money.

I have been in the insurance business most of my life and can say from actual experience that there is not one local agent in one hundred who understands what he is doing when he writes an insurance policy. This being the case, is it any wonder that when you have a loss you find your policies so worded that you do not get the money you think you are entitled to? We have connected with our office a force of trained men whose duty it is to look after your interests in this and other respects and, knowing what I do about insurance, I can truthfully say that progress has been made toward idealism.

Not a Soulless Corporation.

When placing your insurance at Canners' Exchange you are not dealing with a soulless corporation, whose only aim is to get as much out of you as possible with as little return, but you are dealing with your fellow canners, each one of whom wants the other to have fair treatment, if for no other reason than that no one knows when his turn may come and he may want fair treatment himself.

Your management is not in the position of an officer of a stock company, who must make money for his stockholders, but is an employee of your own, employed to look after your interests as a whole, the same as is the worthy Secretary of the National Canners' Association. Personally, I feel that I stand in this position

Rates.

Now, in regard to rates, the question with Canners' Exchange subscribers is not what is the rate of initial deposit required of you, but does the initial deposit bear the proper relation to the average deposit. If it does bear the proper relation to the average, it makes no difference to you whether it is higher or lower than the rate of premium you would pay to a stock company, because the cost of your insurance with Canners' Exchange is not your initial deposit, but the cost if figured at the end of the year and is the same, regardless of the initial deposit, except perhaps a small difference on account of the expense being a percentage. As we said, the cost is the same, regardless of the initial deposit, and the only thing that interests you so far as this deposit is concerned is whether it is equitably adjusted as compared with the average deposits and not as compared with stock company rates of premium.

I wish to impress this on your mind and to ask in justice to yourselves and other subscribers that if you do not thoroughly understand what I mean you will at least take the matter up with our offices and come to understand it before forming an opinion and becoming dissatisfied.

Along the line of equitable adjustment of rates we have made splendid progress and with your continued cooperation we hope before very long to be able to say that we are at least approximating the ideal. It is idealism we are striving for and with the hearty cooperation of subscribers it can be attained.

I hope from what I have said that you will gather some idea of what Canners' Exchange is doing for you and what its aims are.

Cooperative Not Competitive.

Another thing I wish to impress upon you is that Canners' Exchange is cooperative and not competitive. It is not in competition with anyone or any insurance company. It is a plan for the canners to carry their own insurance and to pay only the cost. The United States Steel Corporation, the Standard Oil Company and other large corporations, we understand, carry a large part of their own insurance. They feel that they have a large enough number of separate risks to create an average and think they can therefore better afford to stand a loss now and then than to pay premiums on all their risks, and if they have a proper average they can. Because they do this, are they in the insurance business or are they in competition with the stock companies? Of course, not. They are simply carrying their own insurance. This is exactly what you canners are doing, except that no one of you have enough separate risks to make an average, so you join together at the office of Canners' Exchange and accomplish the same result. You can really see that there is no competition, but you are merely securing your insurance at what it costs.

Law of Average.

I have spoken of the law of average. On this law of average is based the estimated cost by all insurance companies or organizations. You can readily see that if you have one plant and carry your own insurance on this plant you are simply taking a gamble as to whether or not the plant will burn, whereas if you have from one hundred to one thousand separate plants so located that no two could be burned at the same time from the same cause and you carried no insurance on these plants, it would not be a gamble, but would be in accord with the law of average, for the reason that you could from time to time have a loss and still the amount of such losses in the aggregate would be less than the premium you would have to pay to stock companies for insurance on them all.

Canners' Exchange has an unusual average. There is no question but what Canners' Exchange has a larger number of canning properties insured than any stock company doing business in the United States, and, this being the case, Canners' Exchange has a much better average than any stock company.

Why Canners' Exchange Makes a Saving.

I should like to say a few words to you in regard to the premiums collected by the stock companies and the purpose for

TUESDAY morning's session, the second of the joint meetings, was called to order at 10 o'clock by National President Geo. N. Numsen, Baltimore, who said: "The convention will please come to order. We have been delayed somewhat, for which I am very sorry, and I will proceed at once to business by asking Mr. Lansing B. Warner to address us on the subject of cooperative insurance. Mr. Warner read as follows

ADDRESS OF LANSING B. WARNER ON COOPERATIVE INSURANCE.

Eight years ago, at the first annual convention of the National Canners' Association, I had the privilege of presenting to you for the first time the subject of "Cooperative or Inter-Insurance for the Canning Industry." At that time we were just beginning to issue policies and what I said was more or less in the nature of a prospectus, setting forth what had been accomplished by other inter-insurance offices and mutual companies and explaining the general laws of insurance.

At this convention it is very pleasing to be able to report that eight years' experience has proven all of the statements made at that time to be correct and that results have fully proven the wisdom of your cooperating at Canners' Exchange.

Canners Exchange Tried and Successful.

You as subscribers now have in Canners' Exchange a tried plant, which stands in the forefront of inter-insurance offices in the coubtry. It has been successful. It has proven a money saver and a benefit to the industry in many ways. It is another proof of the benefits of cooperation, as compared with individual effort.

Please bear in mind that Canners' Exchange is operated exclusively in the interest of the canning industry and that the efforts of your management are devoted to the general good and are not confined exclusively to the saving of a few dollars in the cost of your insurance each year.

Service.

We believe that our efforts have saved thousands of dollars by preventing fires through suggestions which have reduced the hazard and, therefore, the number of fires.

We are gradually improving the forms under which your insurance is written, thus making the insurance cover as it should cover, so that when you have a loss you get your money.

I have been in the insurance business most of my life and can say from actual experience that there is not one local agent in one hundred who understands what he is doing when he writes an insurance policy. This being the case, is it any wonder that when you have a loss you find your policies so worded that you do not get the money you think you are entitled to? We have connected with our office a force of trained men whose duty it is to look after your interests in this and other respects and, knowing what I do about insurance, I can truthfully say that progress has been made toward idealism.

Not a Soulless Corporation.

When placing your insurance at Canners' Exchange you are not dealing with a soulless corporation, whose only aim is to get as much out of you as possible with as little return, but you are dealing with your fellow canners, each one of whom wants the other to have fair treatment, if for no other reason than that no one knows when his turn may come and he may want fair treatment himself.

Your management is not in the position of an officer of a stock company, who must make money for his stockholders, but is an employee of your own, employed to look after your interests as a whole, the same as is the worthy Secretary of the National Canners' Association. Personally, I feel that I stand in this position and all my efforts are devoted to bring about equity to all. When it comes to a loss and its adjustment I am paying our your money and must be fair to the subscribers who pay the loss, as well as to the one who has the loss, so in making an adjustment I simply endeavor to mete out justice to all, knowing that this is your desire. I cannot give away your money, nor do you wish me to defraud and underpay the one who suffers a loss.

We have adjusted and paid losses to Canners' Exchanges subscribers amounting to almost exactly $900,000, and every loss has been adjusted in a manner satisfactory to the assured. On the other hand, the auditors employed by your Advisory Committee and examiners of State Insurance Departments who have examined our records have remarked on the fairness of our adjustments.

I speak of this at this time merely that you may know we are striving to bring out justice at all times, feeling that we are thus serving your best interests and carrying out your wishes. We are doing our best, but you always have the opportunity to appeal to your Advisory Committee if you are not satisfied with the way we are handling your affairs.

Rates.

Now, in regard to rates, the question with Canners' Exchange subscribers is not what is the rate of initial deposit required of you, but does the initial deposit bear the proper relation to the average deposit. If it does bear the proper relation to the average, it makes no difference to you whether it is higher or lower than the rate of premium you would pay to a stock company, because the cost of your insurance with Canners' Exchange is not your initial deposit, but the cost if figured at the end of the year and is the same, regardless of the initial deposit, except perhaps a small difference on account of the expense being a percentage. As we said, the cost is the same, regardless of the initial deposit and the only thing that interests you so far as this deposit is concerned is whether it is equitably adjusted as compared with the average deposits and not as compared with stock company rates of premium.

I wish to impress this on your mind and to ask in justice to yourselves and other subscribers that if you do not thoroughly understand what I mean you will at least take the matter up with our offices and come to understand it before forming an opinion and becoming dissatisfied.

Along the line of equitable adjustment of rates we have made splendid progress and with your continued cooperation we hope before very long to be able to say that we are at least approximating the ideal. It is idealism we are striving for and with the hearty cooperation of subscribers it can be attained.

I hope from what I have said that you will gather some idea of what Canners' Exchange is doing for you and what its aims are.

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Why Canners Exchange Makes a Saving.

I should like to say a few words to you in regard to the premiums collected by the stock companies and the purpose for which they are collected. In any insurance proposition it is obvious that the receipts must be sufficient to take care of expenditures if the proposition is to be successful and continue so. With the stock companies their source of income is the premium they collect. These premiums must cover every loss, all expenses, a reserve for conflagrations and also a profit to their stockholders. Their losses include honest losses, careless losses and dishonest losses. Therefore, you can see that the stock companies must collect enough premiums from the canning industry to cover these items. Now, which of these items is it necessary for the canners to consider when they carry their insurance themselves at Canners' Exchange? They must pay the losses, but our eight years' experience has proven that the only losses they have to pay are the honest losses and perhaps some careless losses, but the amount they pay on account of careless losses is reduced to a minimum and is very much below what the stock companies have to pay.

With us the conflagration hazard is eliminated and it is unnecessary for us to take this into consideration as the stock companies are obliged to do.

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There is, therefore, a large saving under our plan on the loss item.

The average expenses of the stock companies are in round numbers 45 per cent. The underwriting expenses of Canners' Exchange are limited to 20 per cent, other items of expense being very much more than offset by the interest received on funds.

Under our plan we do not have to consider profit to stockholders. In view of the above, it is clear that on the average over a period of years it is an absolute certainty that under our plan subscribers will save from 30 per cent to 50 per cent in the cost of their insurance. This is not merely a theoretical saving, but has been proven by our eight years' experience.

Absolute Security.

To repeat what has been said many times to our subscribers and at your annual conventions, there is absolutely no question but what any honest loss sustained by Canners' Exchange subscribers will be paid. We have more actual assets back of our policy than any stock company doing business, and our cash assets, available for losses, are very much larger in proportion to the amount involved than are the cash assets available for losses of any stock company.

Summing Up.

In the matter of service there is no local agent or organization which is in a position to do as much for the industry as can our office. This you can readily understand, because we are specializing on this particular class of insurance and on this particular hazard and our success depends largely upon the service rendered.

Our record, so far as savings are concerned, speaks for itself. In eight years actual cash savings, as compared with the cost of the same amount of insurance if placed with stock companies, have amounted to more than $600,000; and, in addition to this, we have been instrumental in having the average rates on canning factories throughout the United States reduced 20 per cent, and the $600,000 saving above referred to is in addition to this 20 per cent rate reduction. This 20 per cent reduction, we estimate, means nearly $400,000 saving to the industry per annum.

We believe that every one of our subscribers will recognize that what Canners' Exchange has accomplished is an object lesson in cooperation and that they will be proud of the record made, with losses paid of nearly one million dollars and with savings direct and indirect amounting to from one to two million dollars and with the improved insurance conditions now existing as compared with eight years ago.

LANSING B. WARNER, Chicago, Ill.

We believe you will see that the statements made in the President's address at Cincinnati by Mr. George G. Bailey, the then President of your Association, in regard to this plan were fully warranted.

We want every responsible canner to become interested as a subscriber at Canners' Exchange, and if there are any of you present who are not now subscribers or if there are any of you who are subscribers and who are not thoroughly familiar with our plan, we trust you will communicate with us and give us the opportunity of explaining to you fully. We should be glad to see any and all of you at our booth in Machinery Hall, where we will be glad to answer any questions you may wish to ask. Gentlemen, I thank you.

PRESIDENT NUMSEN: The next subject on the program is

"FOOD OFFICIALS—BOOSTERS, NOT KNOCKERS," BY DR. BARNARD.

Opposite my home an old house is coming down. It was the first house built in Irvington and its builder intended it to last. So it was built carefully, slowly, with great white oak beams and massive brick walls. It was a year going up, it is being torn down in a week. Constructive work is slow—destructive work is speedy. It takes time to create, but moments may undo the work of a decade, a lifetime or century.

When food control became a function of state and federal governments there were few men trained either for the technical or executive duties of food officials. The new laws were of necessity administered by departments that hardly knew for what they were organized. Conditions in the food supply were bad, adulteration was common, fraud was easy to detect, the people were crying for relief, newly appointed officials were zealous, reporters were eager for news, and the results of the crusades launched in the space of a few years all over the country were just what were to be expected from the conditions that made them necessary. The food industry was attacked, frequently with justice frequently without. "The Jungle," Sinclair's tale of the Chicago Stock Yards, written as a sociological study, turned out to be a first seller, and meat was banished from a million tables almost over night. To admit that one was a butcher was in the public mind a confession of partnership with murderers, and like Hester Prynn, every manufacturer or dealer in foods wore a scarlet letter on his breast.

I'm not saying the suspicion of the consumer was not justified. In many cases it was. But the occasion soon passed. Never in industrial history did a reformation come so quickly or succeed so completely. And, I gladly say it, never again will the consumer have any need to fear that his food is of the character described in a quaint old book printed in London a century ago under the interest-compelling title, "Death in the Pot," which speaks of the bread of that time as "no longer the staff of life but a crutch to bear us onward to the grave."

Today the state and federal food departments are under the direction of trained, conscientious executives and skilled chemists. Whenever a tale is told of vicious practices, it should be told, whenever an offender is brought to the bar of justice that is where he belongs. Pure food legislation is sought, not as a means of relief from an intolerable situation, but because better regulation means inspired confidence in the consumer the passing of unfair competition and better business.

The present day food official believes in the industries he supervises. He looks upon his official position as an opportunity to help the manufacturer, the distributer, the consumer, the state, to better things. And on that plank in the platform of constructive food control we take our stand.

In the trenches dug across the fields of France hundreds of thousands of men are giving up the richest lives the world has ever known in the endeavor to make it possible for succeeding generations to live better, to achieve more. But while we admire the bravery of the man in the trenches and, in the glamor that surrounds the soldier, see in him the dominant figure in the great struggle, the real doers, the vital forces are not pointing the gun or directing the Zeppelins, they are back in the fields producing food. The poor peasant woman in her cabbage field is doing more than a dozen soldiers, the chemist who makes a war bread of equal nutritive value and less cost is worth an army corps. So long as we admire brute force that destroys, more than the constructive force that creates for the present and succeeding generations, I suppose we shall forget the peasant plodding among the cabbages and build monuments to military heroes. At any rate that has always been the rule and at present any change is not in sight.

The world is full of statues to soldiers, where is there any statue of Nicholas Appert? Next year, no doubt, many another bronze hero will be seen astride a rearing horse as an object lesson to our children and an appreciation of valiant services to his country. When, I wonder, and where, will a statue be built of Frank Gorrell with a can of tomatoes in one hand and a can of condensed milk in the other? Frank Gorrell who has done more to advance the welfare of our people than all the heroes in cocked hats who strut across the pages of history.

I wonder if you see the point I am trying to make? The race moves forward only as it betters its environment, and I do not believe progress can be made by force, either by armies at war or officials in the courts. The food official has before him an opportunity almost unequalled. The health of the people depends on the way they are nourished, the prosperity of our country is but a reflection of the vigor of its citizens. Our food supply is far from adequate. It is true almost none of us go hungry to bed. Our stomachs are full—but they are not always filled with the right things and rarely are they filled with the kind of food that furnishes the most nutriment for the least money.

Almost a third of our income is spent for food. The world counts time by its meals. It's time for breakfast time for dinner—time for supper. Men work all day to procure food—women all day preparing it. We may think there are more important things in life than food, but there are not. Now then is it not clear what the field of the official is? It is his work to secure more food, cleaner food, cheaper food, and whatever he may do to this end is in the line of duty.

I have no patience with the official who conceives his job to be the collection of license fees, or who is so zealous in suppressing the fraud of watered milk that he overlooks entirely the vital danger in

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PRESIDENT NUMSEN: The next subject on the program is "Food Officials, Boosters Not Knockers." We canners know a great deal about the knocking. We have not heard so much of the boosting, though recently a great many investigators of canned foods have come to the conclusion that that is one of the best products offered to the American people for consumption, and it is with great pleasure that we have observed that some of the food officials in other states investigating this question closely, have arrived at about the same conclusion upon which we here are unanimous. We have no better friend in that respect than the food commissioner of Indiana, Dr. H. E. Barnard, whom it is now my pleasure to present to you.

Dr. Barnard read his address as follows:

ment was banished from a million tables almost over night. To admit that one was a butcher was in the public mind a confession of partnership with murderers, and like Hester Prynn, every manufacturer or dealer in foods wore a scarlet letter on his breast.

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I have no patience with the official who conceives his job to be the collection of license fees, or who is so zealous in suppressing the fraud of watered milk that he overlooks entirely the vital danger in dirty milk. I suppose someone must scan labels and criticize formulas, but how much more valuable is the work of the inspector who makes a good ice cream plant out of a bad one or who by wise counsel helps a grocer to turn failure into success by substituting cleanliness for carelessness.

The food industries may be easily classified. I begin with the canners, then come the meat packers, the millers, the varied dairy interests, the bakers, confectioners and bottlers. After them, the producers come the distributers, the grocers and dealers in meat, fruit and vegetables. Not many, are there, not a dozen. What better work can a commissioner do than to help the individual units in these great industries to get together, organize, adopt standards, learn that competitors are fine fellows, whom it does one good to know—get new ideas. Why, I'd give more for an opportunity to talk with half a dozen grocers or milkmen or canners for half an hour than for a string of police court verdicts that would fill a

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[fol. 432] PLAINTIFFS' EXHIBIT 22

Taxes, Fees, and Contributions Paid in New York

Fees—The only fee paid to the Insurance Department of New York is $10 per year, paid at the time of filing the annual statement each year. This has been paid each year since the original compliance.

Taxes—Prior to 1936 no taxes were paid. In 1935 the tax law, Section 34, was amended in such a way that the Superintendent contended that it was applicable to inter-insurers. Although the construction contended for by Superintendent was doubtful, reports were filed for the year 1935 and taxes were paid under protest. Reports have been filed and taxes have been paid for subsequent years without protest. No question has been yet raised as to the constitutionality of the tax under the principles declared in *Connecticut General Life Ins. Co. v. Johnson.* The taxes paid are as follows:

Year	Date Paid	CXS	WRI	Total
1935	7/22/36	$2911.11	$946.03	$3857.14
1936	11/28/38	2695.63	1061.45	3757.08
1937	11/28/38	3053.75	1075.25	4129.00
1938	3/ 6/39	3163.64	1119.53	4283.17
Total to date		$11,824.13	$4202.26	$16,026.39

Contributions—The New York Board of Fire Underwriters is a corporation operating under a special New York law authorizing the Board to collect taxes from insurance companies on their premiums. Since 1936 contributions have been made in amounts based on the application of the Board's tax rates to the Subscribers' deposits. Such amounts have been paid and accepted as voluntary contributions without admitting any liability therefor. The amounts are as follows:

Period	Date Paid	CXS	WRI	Total
1936	4/27/37	$161.70	$277.42	$439.12
1937 (1st 1/2)	7/28/37	34.02	167.93	201.95
1937 (2d)	1/24/38	120.41	154.96	275.37
1938 (1st)	7/28/38	92.99	237.61	330.60
1938 (2d)	1/18/39	79.17	71.25	150.42
1939 (1st)	7/12/39	61.36	134.08	195.44
Total to date		$549.65	$1043.25	$1592.90

(Here follows 1 photolithograph, side folio 433)

PLAINTIFF'S EXHIBIT 23

Snider Packing Corporation

NEW YORK
370 LEXINGTON AVE

CHICAGO
323 W. POLK STREET

Rochester, New York
40 Franklin Street

J. N. LAMBERT
TREASURER

January 24, 1940

LANSING B. WARNER
INCORPORATED

JAN 25 PM 12

Lansing B. Warner, Incorporated
540 North Michigan Avenue
Chicago, Illinois

Gentlemen:

We acknowledge, with thanks, the safe receipt of remittances covering savings and interest for the year ended December 31, 1939 in the total amount of $19,526.27.

We are highly gratified with the savings returned to us and extend our compliments on your accomplishments for the year.

Sincerely yours,

SNIDER PACKING CORPORATION

Treasurer

JNL:RDK

January 24, 1940

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FEB JAN 25 PM 12 4

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SNIDER PACKING CORPORATION

Treasurer

JNL:RDK

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fol. 434]

PLAINTIFFS' EXHIBIT 25.

Analysis of Income and Disbursements* of Five Large Insurance Companies Compared with Warner Reciprocal Insurers

Year Ended December 31, 1938

	1938 Income			1938 Disbursements					
	Premium	Other	Total	Losses and Loss Expense	Operating and Investment Expense	Total Losses & Operating Expense	Dividends to Stockholders	Dividends to Policyholders	Total
Aetna Insurance Co.	92.5%	7.5%	100.0%	44.8%	49.9%	94.7%	5.3%	.....	100.0%
The Home Insurance Co.	89.5	10.5	100.0	48.3	44.0	92.3	7.7	.....	100.0
Great American Insurance Co.	85.6	14.4	100.0	38.4	50.8	89.2	10.8	.....	100.0
Hartford Fire Insurance Co.	91.4	8.6	100.0	43.7	49.9	93.6	6.4	.....	100.0
Insurance Company of North America	84.3	15.7	100.0	38.2	50.9	89.1	10.9	.....	100.0
Weighted Average	89.1%	10.9%	100.0%	44.2%	47.9%	92.1%	7.9%	.....	100.0%

	Earned Guaranty Deposits (Less Excess Insurance)	Interest Income	Total	Losses and Loss Expense	Expenses	Total Losses & Operating Expense	Dividends to Stockholders	Savings returned or Credited to Subscribers and Agent	Total
Warner Reciprocal Insurers	97.5%	2.5%	100.0%	16.9%	27.2%	44.1%	.....	55.9%	100.0%

*Data taken from the "1939 Edition of Best's Insurance Reports."

[fol. 435-436]

PLAINTIFFS' EXHIBIT 26

Analysis of Income and Disbursements* of Five Large Insurance Companies Compared with Canner Exchange Subscribers at Warner Inter-Insurance Bureau

Year Ended December 31, 1938

	1938 Income			1938 Disbursements					
	Premium	Other	Total	Losses and Loss Expense	Operating and Investment Expense	Total Losses & Operating Expense	Dividends to Stockholders	Dividends to Policyholders	Total
Aetna Insurance Co.	92.5%	7.5%	100.0%	44.8%	49.9%	94.7%	5.3%	.....	100.0%
The Home Insurance Co.	89.5	10.5	100.0	48.3	44.0	92.3	7.7	.....	100.0
Great American Insurance Co.	85.6	14.4	100.0	38.4	50.8	89.2	10.8	.....	100.0
Hartford Fire Insurance Co.	91.4	8.6	100.0	43.7	49.9	93.6	6.4	.....	100.0
Insurance Company of North America	84.3	15.7	100.0	38.2	50.9	89.1	10.9	.....	100.0
Weighted Average	89.1%	10.9%	100.0%	44.2%	47.9%	92.1%	7.9%	.....	100.0%
	Earned Expense & Guarantee Fund (Less Excess Insurance)	Interest Income	Total	Losses and Loss Expense	Expenses	Total Losses & Operating Expense	Dividends to Stockholders	Savings to Subscribers	Total
Canners Exchange Subscribers	96.4%	3.6%	100.0%	23.5%	28.4%	51.9%	.....	48.1%	100.0%

* Data taken from the "1939 Edition of Best's Insurance Reports."

GENERAL INTERROGATORIES

1. Have all the transactions of the Exchange of which notice was received on or before the close of business December 31, been truthfully and accurately entered on its books? Answer: Yes
2. Except as shown in the next succeeding question, does this statement show the condition of the Exchange as shown by the books, records and data at the close of business December 31? Answer: Yes (See Note on Page 3)
3. Have there been included in this statement proper reserves to cover liabilities which may have been actually incurred on or before December 31, but of which no notice was received until subsequently? Answer: Yes
4. Do your subscribers limit their several liability in the event of current losses exceeding current premium deposits received and accumulated funds? Answer: See Appointment of Agent on File
5. To what extent is the liability of the subscribers limited? Answer: See Appointment of Agent on File
6. Gross premium deposits (less reinsurance and return premium deposits) received since organization of Exchange $ 8,437,955.79
7. Net losses paid since organization of Exchange $ 2,663,646.85
8. Total dividends to subscribers declared since organization of Exchange $ 3,051,929.85
9. Net dividends paid to subscribers since organization of Exchange $ See Line 8
10. Largest gross aggregate amount insured in any one hazard, without any deductions whatever for reinsurance, whether the same be in admitted or non-admitted companies. Answer: $ 300,000.00
11. Largest net aggregate amount insured in any one hazard. Answer: $ 70,500.00
12. Losses incurred during Current Year, $ 115,351.44
13. Give kinds of insurance written Fire and Allied Lines
14. Amount of commission on business of Exchange received by Attorney-in-Fact, $ See Appointment of Agent on File
15. What expenses are not paid by Attorney-in-Fact? See Appointment of Agent on File
16. Were all the stocks, bonds and other securities owned December 31, of Current Year, in the actual possession of the Attorney-in-Fact for the subscribers of the Exchange on said date, except as shown by the schedules of special and other deposits? Answer: Yes
    If not, give full and complete information relating thereto
17. Were any of the stocks, bonds or other assets of the Exchange loaned during the year covered by this statement? Answer: No
    If so, give full and complete information relating thereto
18. Does the company own real estate in the name of a holding company? Answer: No No. of Parcels
    Total Book Value $
18A. State when last examination of the Exchange's affairs was conducted by any insurance department and by what department or departments? Answer: Convention Examination made as of December 31, 1956 and dated June 19, 1957. The examination was made by the Insurance Departments of Illinois, Maryland and Montana.
19. Has any change been made during the year of this statement in the form of Policy, form of Power of Attorney, location of the office of the Exchange? Answer: No
    If not previously filed, furnish herewith a certified copy of the instrument as amended.
20. What officials and heads of departments of the Exchange supervised the making of this report? Executive Vice President and Head of Accounting Department
21. Have the instructions printed on the inside front cover of this blank been followed in every detail? Answer: Yes
22. Does the Exchange appoint local agents? No
23. What commission is paid local agents? Is the commission paid out of premium deposits or by Attorney-in-Fact? Not Applicable
24. Are the accounts so kept as to disclose the individual account of each member? Yes
25. In what states, territories, or foreign countries is the exchange authorized to transact business? Answer: Ala., Ark., Calif., Colo., District of Columbia, Fla., Ga., Idaho, Ill., Ind., Iowa, Kans., Ky., Md., Me., Mich., Minn., Miss., ... Ohio, Okla., Ore., Pa., S.C., S.D., Tenn., Texas, Utah, Va., Wash., Wis.,

If so, give full and complete information relating thereto.....

18. Does the company own real estate in the name of a holding company? Answer: No No. of Parcels
Total Book Value $.....

18A. State when last examination of the Exchange's affairs was conducted by any insurance department, and by what department or departments? Answer: Convention Examination made as of December 31, 1936 and dated June 19, 1937. The examination was made by the Insurance Departments of Illinois, Maryland and Montana.

19. Has any change been made during the year of this statement in the form of Policy, form of Power of Attorney, location of the office of the Exchange?
Answer: No
If not previously filed, furnish herewith a certified copy of the instrument as amended.

20. What officials and heads of departments of the Exchange supervised the making of this report? Executive Vice President and Head of Accounting Department

21. Have the instructions printed on the inside front cover of this blank been followed in every detail? Answer: Yes

22. Does the Exchange appoint local agents? No

23. What commission is paid local agents? ..... Is the commission paid out of premium deposits or by Attorney-in-Fact?
Not Applicable

24. Are the accounts so kept as to disclose the individual account of each member? Yes

25. In what states, territories, or foreign countries is the exchange authorized to transact business? Answer: Ala., Ark., Calif., Colo., District of Columbia, Fla., Ga., Idaho, Ill., Ind., Iowa, Kans., Ky., Md., Me., Mich., Minn., Miss., Mo., Neb., N.Y., N.C., Ohio, Okla., Ore., Pa., S.C., S.D., Tenn., Texas, Utah, Va., Wash., Wis., Ontario, B.C., Alberta, Manitoba, Saskatchewan and Dominion of Canada.

26. Total amount of money loaned to officers or members of Managing or Advisory Committee? $ None

27. Do you require that an application and Power of Attorney, both signed by the Subscriber, be on file at this Exchange prior to the issue of a policy? Yes

28. Do you collect an advance premium deposit? Yes Is a membership fee the only initial deposit? No Membership Fee

29. Are Collections, of premium deposits, made on post mortem basis? No

STATE OF ILLINOIS
County of COOK } ss.

Clarence R. Leland, Executive Vice President of Lansing B. Warner, Incorporated, being duly sworn, deposes and says that said Corporation is Agent or Attorney-in-Fact for Warner Reciprocal Insurers that he makes this affidavit as such Attorney-in-Fact or as Executive Vice President, thereof; and that on the thirty-first day of December, 1936, all the above described assets were the absolute property of the said subscribers free and clear from any liens or claims thereon, except as above stated; and that the foregoing statements, with the schedules and explanations therein contained, annexed or referred to, are a full and correct exhibit of all the assets, liabilities, income, and disbursements, and of the condition and affairs of the said Exchange on the said 31st day of December last, and for the year ended on that date, according to the best of his information, knowledge and belief.

Clarence R. Leland

Subscribed and sworn to before me, this 24th day of February, 1937.

W. M. Gerard
Notary Public.

NOTE: In addition to the explanation or note on the inside front cover of this statement, it should be noted that certain further words on this page are not applicable to reciprocal or inter-insurance and should be corrected or be defined as follows and the statement is submitted on that basis:

Wherever the words "premium" or "premium deposit" occur, they should be "Guaranty Deposit" as previously noted; in lines 1 and 2 "the Exchange" should be "Warner Reciprocal Insurers" and "business" should be "books"; in lines 6, 7, 8 and 9 "organization of exchange" should be "beginning of exchange of contracts"; in lines 8 and 9 "dividends" should be "savings"; in line 1 "its" should be "such"; in line 14 "commission on business exchange received by" should be "compensation of"; in line 24 "member" should be "subscriber"; in line 28 "you collect" should be "the subscribers make".

Form 8

Bonds to be grouped in following manner and each group arranged alphabetically:
Government
Schools, Territories and Possessions
Political Subdivisions of States, Territories and Possessions
Railroads
Public Utilities
Industrial and Miscellaneous

ANNUAL STATEMENT FOR THE YEAR 1938 OF THE WARNER RECIPROCAL INSURERS
(Write or stamp name of Exchange)

SCHEDULE D—Part 1

Showing all BONDS *Owned December 31 of Current Year*

Show sub-totals for each group.

Supplemental columns for data concerning Amortization.

(1) DESCRIPTION Give complete and accurate description of all bonds owned, including the location of all street railway and miscellaneous non-stocks. If bonds are "coupon" bonds give amount now- turing each year.	(2) INTEREST Rate of	(2) INTEREST *When Paid	(3) DATE OF MATURITY Year	(3) DATE OF MATURITY Month	(3) DATE OF MATURITY Optional	(4) Book Value	(5) Par Value	(6) Rate Used to Obtain Market Value	(7) Market Value (exclusive of accrued interest)	(8) Actual Cost (Excluding accrued interest)	(9) INTEREST Amount Due and Accrued Dec. 31 of Current Year on Bonds Not in Default	(9) INTEREST Amount Received During Year	(10) Increase by Adjustment Credit to Surplus Account During Year	(11) Decrease by Adjustment Charge to Surplus Account During Year	(12) Amount of Interest Received During Year Included in Column 9	(13) Admitted Value	(14) When Acquired	(15) Amount Actually Paid for Accrued Interest	(16) Amount of Premium Paid	(17) Amortization Credited During Year	(18) Amortization Charged During Year	(19) Discount Accrued During Year
U.S. Treasury Bonds	3½	A.O.	1952	Oct	1947	100,000.00	100,000.00	119	119,000.00	100,000.00	896.50	4,250.00	None	None	None	Yes	1922		100,000	None	-
U.S. Treasury Bonds	3-3/4	M.S.	1956	Mar	1946	100,000.00	100,000.00	111	111,000.00	100,500.00	1,099.32	3,750.00	None	None	None	Yes	1926		100,180	None	25.00
U.S. Treasury Bonds	3½	A.O.	1941	Oct	1943	273,505.25	275,000.00	110	302,500.00	277,970.75	1,9 5.47	8,937.50	None	None	None	Yes	1933		276,341	None	2[illegible]
U.S. Treasury Bonds	2-7/8	M.S.	1960	Mar	1955	5,000.00	5,000.00	105	5,250.00	5,063.13	42.13	143.75	None	None	None	Yes	1934	Re Ala Rate	5,057	None	3.00

Regular deposits required by State and Dominion Insurance Departments, included above:

Description	Location	Purpose
$50,000. U.S.Treasury Bonds 3½	Dept. of Insurance, State of Illinois	Regular deposit for State of Illinois
$10,000. U.S.Treasury Bonds 3-3/4%	Treasury Dept. State of Georgia	Regular deposit for State of Georgia
$ 5,000. U.S.Treasury Bonds 2-7/8%	National Trust Co., Toronto	Regular deposit for Dominion of Canada
$10,000. U.S.Treasury Bonds 3½	First National Bank, Chicago	In Trust for American Surety Co., of N.Y. for Virginia Bond

438

Totals	478,583.25	480,000.00	540,750.00	403,533.80	3,923.50	17,001.25	None	None	None	401,578	None	300.00

SPECIAL NOTE—In Statements to the New York Department all exchanges are required to report amortized values on amortizable securities and values on Convention basis for other securities in column 16.

*Insert initial letters of months in which interest is payable.

(Preferred bonds in default as to principal or interest, and bonds not actually secured, are to be entered in this column at market or as Exchanges which use "Amortized Values" as "Book Values" may enter such values for these columns, and provide the following facts in: Increase and Decrease by Adjustment in Book Values, recapitulate as otherwise indicated.)

NOTE: This supplemental information, required of all Exchanges which carries their bonds, is not to be used as a substitute for the information required in the preceding columns but in addition thereto.

The increases and decreases in amortized values are the same as those shown in columns for Increase and Decrease by Adjustment in Book Values, recapitulate as otherwise indicated.)

NOTE: This supplemental information, required of all Exchanges which carries their bonds, is not to be used as a substitute for the information required in the preceding columns but in addition thereto.

Form 8
Bonds to be grouped in following manner and each group arranged alphabetically:
ANNUAL STATEMENT FOR THE YEAR 1938 OF THE WARNER RECIPROCAL INSURERS
SCHEDULE D—Part 1
Showing all BONDS *Owned December 31 of Current Year*
Show sub-totals for each group.
Supplemental columns for data concerning Amortization.
Regular deposits required by State and Dominion Insurance Departments, included above:
Totals 478,583.25 480,000.00 540,750.00 403,533.80 3,923.50 17,001.25 None None None 401,578 None 300.00
*SPECIAL NOTE—In Statements to the New York Department all exchanges are required to report amortized values on amortizable securities and values on Convention basis for other securities in column 16.
*Insert initial letters of months in which interest is payable.

Form 9 ANNUAL STATEMENT FOR THE YEAR END OF THE WESTERN REINSURANCE COMPANY

SCHEDULE T—EXHIBIT OF PREMIUMS WRITTEN
Allocated by States and Territories

(May be filed not later than April 1st)

States, etc.	Gross Premiums, Less Return Premiums						Net Premiums		Dividends Paid or Credited to Policyholders less Received on Reinsurance
	Direct Writings	Reinsurance Assumed From		Reinsurance Ceded To					
		Unauthorized Companies	Authorized Companies	Unauthorized Companies	Authorized Companies				
	(a)	(b)	(c)	(d)	(e)		(f)		(g)
Alabama	8,539 51						8,539	51	3,516 43
Alaska	-						-		-
Arizona	7,228 19						7,228	19	2,976 45
Arkansas	10,550 90						10,550	90	4,344 69
California	20,858 10						20,858	10	8,589 02
Colorado	883 42						883	42	363 78
Connecticut	6,742 69						6,742	69	2,776 55
Delaware	1,141 26						1,141	26	469 95
Dist. Columbia	1,298 40						1,298	40	534 66
Florida	37,356 83						37,356	83	15,382 93
Georgia	12,051 45						12,051	45	4,962 59
Hawaii	3,868 34						3,868	34	1,593 00
Idaho	2,906 40						2,906	40	1,196 81
Illinois	77,642 74						77,642	74	31,972 00
Indiana	45,127 79						45,127	79	18,582 86
Iowa	40,611 06						40,611	06	16,722 97
Kansas	2,181 84						2,181	84	898 45
Kentucky	10,862 25						10,862	25	4,472 90
Louisiana	30,843 23						30,843	23	12,700 73
Maine	868 12						868	12	357 48
Maryland	14,779 23						14,779	23	6,085 84
Massachusetts	6,142 70						6,142	70	2,529 46
Michigan	42,967 98						42,967	98	17,693 51
Minnesota	25,784 89						25,784	89	10,617 79
Mississippi	9,208 75						9,208	75	3,792 01
Missouri	9,096 34						9,096	34	3,745 72
Montana	998 06						998	06	410 98
Nebraska	5,667 95						5,667	95	2,333 97
Nevada	-						-		-
New Hampshire	445 72						445	72	183 54
New Jersey	14,075 49						14,075	49	5,796 05
New Mexico	1,137 46						1,137	46	468 39
New York	95,162 82						95,162	82	39,186 48
No. Carolina	20,091 26						20,091	26	8,273 25
No. Dakota	652 96						652	96	268 88
Ohio	56,692 09						56,692	09	23,344 87
Oklahoma	12,068 91						12,068	91	4,969 78
Oregon	6,326 98						6,326	98	2,605 35
Pennsylvania	62,729 91						62,729	91	25,831 14
Rhode Island	3,258 51						3,258	51	1,341 80
So. Carolina	14,132 07						14,132	07	5,819 35
So. Dakota	4,711 58						4,711	58	1,940 15
Tennessee	11,020 07						11,020	07	4,537 88
Texas	67,302 46						67,302	46	27,714 04
Utah	5,273 72						5,273	72	2,171 63
Vermont	683 38						683	38	281 40
Virginia	23,395 48						23,395	48	9,633 87
Washington	10,261 84						10,261	84	4,225 66
West Virginia	12,054 69						12,054	69	4,963 92
Wisconsin	42,912 12						42,912	12	17,670 90
Wyoming	626 88						626	88	258 06
Canada	2,925 34						2,925	34	1,204 61
Cuba									
Porto Rico									
Philippine Is.									
Mexico									
Aberdeen (India)				62,347	59		- 62,347	59	

Indiana	45,147	79												45,147	79	16,204	00
Iowa	40,611	06												40,611	06	16,722	97
Kansas	2,181	84												2,181	84	896	45
Kentucky	10,862	25												10,862	25	4,472	90
Louisiana	30,843	23												30,843	23	12,700	73
Maine	868	12												868	12	357	48
Maryland	14,779	23												14,779	23	6,085	84
Massachusetts	6,142	70												6,142	70	2,529	46
Michigan	42,967	98												42,967	98	17,693	51
Minnesota	25,784	89												25,784	89	10,617	79
Mississippi	9,208	75												9,208	75	3,792	01
Missouri	9,096	34												9,096	34	3,745	72
Montana	998	06												998	06	410	98
Nebraska	5,667	95												5,667	95	2,333	97
Nevada	-													-		-	
New Hampshire	445	71												445	71	183	54
New Jersey	14,075	49												14,075	49	5,796	05
New Mexico	1,137	46												1,137	46	468	39
New York	95,162	82												95,162	82	39,186	48
No. Carolina	20,091	26												20,091	26	8,273	25
No. Dakota	652	96												652	96	268	88
Ohio	56,692	09												56,692	09	23,344	87
Oklahoma	12,068	91												12,068	91	4,969	78
Oregon	6,326	98												6,326	98	2,605	35
Pennsylvania	62,729	91												62,729	91	25,831	14
Rhode Island	3,258	51												3,258	51	1,341	80
So. Carolina	14,132	07												14,132	07	5,819	35
So. Dakota	4,711	58												4,711	58	1,940	15
Tennessee	11,020	07												11,020	07	4,537	88
Texas	67,302	46												67,302	46	27,714	04
Utah	5,273	72												5,273	72	2,171	63
Vermont	683	38												683	38	281	40
Virginia	23,395	48												23,395	48	9,633	87
Washington	10,261	84												10,261	84	4,225	66
West Virginia	12,054	69												12,054	69	4,963	92
Wisconsin	42,912	12												42,912	12	17,670	98
Wyoming	626	88												626	88	258	06
Canada	2,925	34												2,925	34	1,204	61
Cuba																	
Porto Rico																	
Philippine Is.																	
Mexico																	
Other foreign (Swiss)																	
										62,347	59			- 62,347	59		
*Totals	[illegible]	85								62,347	59			841,802	56	[illegible]	19

*Total of Cancels to agree with page 3 Item 10, column 5 plus Items 11, 12, column 6 of Annual Statement.

GENERAL INTERROGATORIES

Cannero Exchange Subscribers at Warner Inter-Insurance Bureau

1. Have all the transactions of the Exchange of which notice was received on or before the close of business December 31, been truthfully and accurately entered on its books? Answer: Yes ✓
2. Except as shown in the next succeeding question, does this statement show the condition of the Exchange as shown by the books, records and data at the close of business December 31? Answer: Yes (See Note on Page 2) ✓
3. Have there been included in this statement proper reserves to cover liabilities which may have been actually incurred on or before December 31, but of which no notice was received until subsequently? Answer: Yes ✓
4. Do your subscribers limit their several liability in the event of current losses exceeding current premium deposits received and accumulated funds? Answer: See Power of Attorney on File ✓
5. To what extent is the liability of the subscribers limited? Answer: See Power of Attorney on File ✓
6. Gross premium deposits (less reinsurance and return premium deposits) received since organization of Exchange $ 31,203,617.57 ✓
7. Net losses paid since organization of Exchange $ 8,952,174.72 ✓
8. Total dividends to subscribers declared since organization of Exchange $ 13,249,191.76 ✓
9. Net dividends paid to subscribers since organization of Exchange $ See Line 8 ✓
10. Largest gross aggregate amount insured in any one hazard, without any deductions whatever for reinsurance, whether the same be in admitted or non-admitted companies. Answer: $ 1,000,000.00
11. Largest net aggregate amount insured in any one hazard. Answer: $ 158,000.00
12. Losses incurred during Current Year, $ 478,765.44
13. Give kinds of insurance written Fire and Allied Lines ✓
14. Amount of commission on business of Exchange received by Attorney-in-Fact, $ See Power of Attorney on File ✓
15. What expenses are not paid by Attorney-in-Fact? See Power of Attorney on File
16. Were all the stocks, bonds and other securities owned December 31, of Current Year, in the actual possession of the Attorney-in-Fact for the subscribers of the Exchange on said date, except as shown by the schedules of special and other deposits? Answer: Yes
    If not, give full and complete information relating thereto
17. Were any of the stocks, bonds or other assets of the Exchange loaned during the year covered by this statement? Answer: None ✓
    If so, give full and complete information relating thereto
18. Does the company own real estate in the name of a holding company? Answer: No ✓ No. of Parcels
    Total Book Value $
18A. State when last examination of the Exchange's affairs was conducted by any insurance department, and by what department or departments? Answer: Convention Examination made as of December 31, 1956 and dated June 19, 1957. The examination was made by the Insurance Departments of Illinois, Maryland and Montana
19. Has any change been made during the year of this statement in the form of Policy, form of Power of Attorney, location of the office of the Exchange? Answer: No ✓
    If not previously filed, furnish herewith a certified copy of the instrument as amended.
20. What officials and heads of departments of the Exchange supervised the making of this report? Executive Vice President and Head of Accounting Department ✓
21. Have the instructions printed on the inside front cover of this blank been followed in every detail? Answer: Yes ✓
22. Does the Exchange appoint local agents? No ✓
23. What commission is paid local agents? Is the commission paid out of premium deposits or by Attorney-in-Fact?
    Not Applicable
24. Are the accounts so kept as to disclose the individual account of each member? Yes ✓
25. In what states, territories, or foreign countries is the exchange authorized to transact business? Answer: Ala., Ark., Calif., Colo., District of Columbia, Fla., Idaho, Ill., Ind., Iowa, Kans., Ky., Md., Me., Mich., Minn., Miss., Mo., Nebr., N.Y., Ohio, Okla., Ore., Pa., Tenn., Texas, Utah, Va., Wash., Wisc., Ontario, British Columbia, and Dominion of Canada.
26. Total amount of money loaned to officers or members of Managing or Advisory Committee? $ None ✓
27. Do you require that an application and Power of Attorney, both signed by the Subscriber, be on file at this Exchange prior to the issue of a ... Yes ✓

If not, give full and complete information relating thereto.

17. Were any of the stocks, bonds or other assets of the Exchange loaned during the year covered by this statement? Answer: None
If so, give full and complete information relating thereto

18. Does the company own real estate in the name of a holding company? Answer: No No. of Parcels
Total Book Value $

18A. State when last examination of the Exchange's affairs was conducted by any insurance department, and by what department or departments? Answer: Convention Examination made as of December 31, 1936 and dated June 19, 1937. The examination was made by the Insurance Departments of Illinois, Maryland and Montana

19. Has any change been made during the year of this statement in the form of Policy, form of Power of Attorney, location of the office of the Exchange?
Answer: No
If not previously filed, furnish herewith a certified copy of the instrument as amended.

20. What officials and heads of departments of the Exchange supervised the making of this report? Executive Vice President and Head of Accounting Department

21. Have the instructions printed on the inside front cover of this blank been followed in every detail? Answer: Yes

22. Does the Exchange appoint local agents? No

23. What commission is paid local agents? Is the commission paid out of premium deposits or by Attorney-in-Fact?
Not Applicable

24. Are the accounts so kept as to disclose the individual account of each member? Yes

25. In what states, territories, or foreign countries is the exchange authorized to transact business? Answer: Ala., Ark., Calif., Colo., District of Columbia, Fla., Idaho, Ill., Ind., Iowa, Kans., Ky., Md., Me., Mich., Minn., Miss., Mo., Nebr., N.Y., Ohio, Okla., Ore., Pa., Tenn., Texas, Utah, Va., Wash., Wisc., Ontario, British Columbia, and Dominion of Canada.

26. Total amount of money loaned to officers or members of Managing or Advisory Committee? $ None

27. Do you require that an application and Power of Attorney, both signed by the Subscriber, be on file at this Exchange prior to the issue of a policy? Yes

28. Do you collect an advance premium deposit? Yes Is a membership fee the only initial deposit? No membership fee

29. Are Collections, or premium deposits, made on post mortem basis? No

STATE OF ILLINOIS
County of COOK } ss.

Clarence E. Leland, Executive Vice President of Lansing B. Warner, Incorporated, being duly sworn, deposes and says, that said Corporation is Attorney-in-Fact for Canners Exchange Subscribers at Warner Inter-Insurance Bureau, that he makes this affidavit as such Attorney-in-Fact or as Executive Vice President (officers) thereof, and that on the thirty-first day of December, 1938, all the above described assets were the absolute property of the said subscribers free and clear from any liens or claims thereon, except as above stated, and that the foregoing statements, with the schedules and explanations therein contained, annexed or referred to, are a full and correct exhibit of all the assets, liabilities, income and disbursements, and of the condition and affairs of the said Exchange on the said 31st day of December last, and for the year ended on that day, according to the best of his information, knowledge and belief.

Canners Exchange Subscribers at Warner Inter-Insurance Bureau

Clarence E. Leland

Subscribed and sworn to before me, this 24th day of February, 1939.

M M Godard
Notary Public.

NOTE: In addition to the explanation or note on the inside front cover of this statement, it should be noted that certain further words on this page are not applicable to reciprocal or inter-insurance and should be corrected or be defined as follows and the statement is submitted on that basis:

Wherever the words "premium" or "premium deposit" occur, they should be "Expense and Guarantee Fund Deposit" as previously noted; in lines 1 and 2 "the Exchange" should be "Canners Exchange Subscribers" and "business" should be "books"; in lines 6, 7, 8 and 9 "organization of exchange" should be "beginning of exchange of contracts"; in lines 8 and 9 "dividends" should be "savings"; in line 1 "its" should be "such"; in line 14 "commission on business exchange received by" should be "compensation of"; in line 24 "member" should be "subscriber"; in line 28 "you collect" should be "the subscribers make".

Form 8

Bonds to be grouped in following manner and each group arranged alphabetically:
Government
States, Territories and Possessions
Political Subdivisions of States, Territories and Possessions
Railroad
Public Utilities
Industrial and Miscellaneous Show sub-totals for each group.

Cantors Exchange Subscribers

ANNUAL STATEMENT FOR THE YEAR 1938 OF THE ... of Warner Inter-Insurance Bureau
(Write or stamp name of Exchange)

SCHEDULE D—Part 1

Showing all **BONDS** *Owned December 31 of Current Year*

(1) DESCRIPTION Give complete and accurate description of all bonds owned, including the location of all street railway and miscellaneous loan securities. If bonds are "scrip" loans give amount maturing each year.	(2) INTEREST Rate of	(2) INTEREST When Paid	(3) DATE OF MATURITY Year	(3) DATE OF MATURITY Month	(3) DATE OF OPTION	(4) Book Value	(5) Par Value	(6) Rate Used to Obtain Market Value	(7) Market Value (including accrued interest)	(8) Actual Cost (including accrued interest)	(9) INTEREST Amount Due and Accrued Dec. 31 of Current Year on bonds not in default	(9) INTEREST Gross Amt Received During Year	(10) Increase by Adjustment, or Book Value During Year	(11) Decrease by Adjustment, or Book Value During Year	(12) Amount of Interest due and accrued Dec. 31, current year, on bonds in default as to principal or interest	(13) Are Taxes Levies Against Secured?	(14) Year Acquired	(15) Effective Rate of Interest at Which Purchase Was Made	(16) †Amortized or Investment Value Dec. 31 of Current Year (See Special Note)	(17) Increase in Amortized Value During Year
						$	$		$	$	$	$	$	$	$				$	$
U.S. Treasury Bonds	4%	J.D.	1954	Dec	1944	300,000.00	300,000.00	115	345,000.00	314,250.00	526.04	12,000.00	None	None	None	Yes	1925-27	VALUES ON A PRO RATA BASIS	304,724	None
U.S. Treasury Bonds	3½%	M.S.	1958	Mar	1946	200,000.00	200,000.00	114	228,000.00	201,000.00	2,198.64	7,500.00	None	None	None	Yes	1926		200,360	None
U.S. Treasury Bonds	3½%	M.S.	1943	Mar	1941	150,000.00	150,000.00	107	160,500.00	154,703.13	1,484.06	5,062.50	None	None	None	Yes	1931		151,057	None
U.S. Treasury Bonds	3¼%	A.O.	1945	Oct	1943	760,000.00	760,000.00	110	836,000.00	775,171.02	5,210.69	24,700.00	None	None	None	Yes	1933		765,076	None
U. S. Treasury Bonds	2½%	M.S.	1960	Mar	1955	365,000.00	365,000.00	105	383,250.00	366,500.00	3,076.25	10,493.75	None	None	None	Yes	1935		366,232	None
U.S. Treasury Bonds	2½%	M.S.	1951	Mar	1948	500,000.00	500,000.00	106	530,000.00	502,187.50	4,087.38	13,750.00	None	None	None	Yes	1937		501,858	None

Regular deposits required by State and Dominion Insurance Department, included above:

Description	Location	Purpose
$50,000. U.S.Treasury Bonds 3 %	Department of Insurance State of Illinois	Regular deposit for State of Illinois
$35,000. U.S.Treasury Bonds 2-7/8%	National Trust Co. Toronto	Regular deposit for Dominion of Canada

Totals	$2,275,000.00	$2,275,000.00		$2,482,750.00	$2,313,811.65	$16,583.06	$73,506.25	None	None	None								$1,289,310.	None	$2

SPECIAL NOTE—In statements to the New York Department all exchanges are required to report amortized values on amortizable securities and values on Connection basis for other securities in column 16.

*Insert initial letters of months in which interest is payable.

†Perpetual bonds, bonds in default as to principal or interest, and bonds not amply secured, are to be entered in this column at market value.
Exchanges which use "Amortized Values" as "Book Values" may omit entering figures in these columns, and provide the following footnote: "The increase and decrease in amortized values are the same as those shown in columns for 'Increase by Adjustment in Book Value' respecting as otherwise indicated."
NOTE—This supplemental information, required of all Exchanges which amortize their bonds, is not to be used as a substitute for the information required in the preceding columns but in addition thereto.

Canners Exchange Subscribers

ANNUAL STATEMENT FOR THE YEAR 1938 OF THE ... of Warner Inter-Insurance Bureau
(Write or stamp name of Exchange)

SCHEDULE D—Part 1

Showing all **BONDS** *Owned December 31 of Current Year*

...ouped in following manner and each group arranged alphabetically:
...ries and Possessions
...divisions of States, Territories and Possessions
...Miscellaneous Show sub-totals for each group.

(1) DESCRIPTION (Write description of all bonds in connection of all street railway in companies. If bonds have given amount ma- each year.	(2) INTEREST Rate of	(2) INTEREST When Paid	(3) DATE OF MATURITY Year	(3) DATE OF MATURITY Month	(3) OPTION	(4) BOOK VALUE	(5) PAR VALUE	(6) RATE USED TO OBTAIN MARKET VALUE	(7) MARKET VALUE (excluding accrued interest)	(8) ACTUAL COST (excluding accrued interest)	(9) INTEREST Amount Due and Accrued Dec. 31 of Current Year on bonds not in default	(9) INTEREST Gross Am't Received During Year	(10) INCREASE, BY ADJUSTMENT, IN BOOK VALUE DURING YEAR	(11) DECREASE, BY ADJUSTMENT, IN BOOK VALUE DURING YEAR	(12) AMOUNT OF INTEREST due and accrued Dec. 31, current year, on bonds in default as to principal or interest	(13) ARE THESE BONDS AMPLY SECURED?	(14) YEAR ACQUIRED	(15) Effective Rate of Interest at Which Purchase Was Made	(16) †Amortized or Investment Value Dec. 31 of Current Year (See Special Note)	(17) †Increase in Amortized Value During Year	(18) †Decrease in Amortized Value During Year (See Note)
						$	$		$	$	$	$	$	$	$				$	$	$
asury Bonds	4%	J.D.	1954	Dec	1944	300,000.00	300,000.00	115	345,000.00	314,250.00	526.04	12,000.00	None	None	None	Yes	1925	VALUES ON A PRO RATA BASIS	304,727	None	793.
asury Bonds	3½%	M.S.	1958	Mar	1946	200,000.00	200,000.00	114	228,000.00	201,000.00	2,198.64	7,500.00	None	None	None	Yes	1926		200,360	None	50.
asury Bonds	3½%	M.S.	1943	Mar	1941	150,000.00	150,000.00	107	160,500.00	154,703.13	1,484.06	5,062.50	None	None	None	Yes	1931		151,057	None	488
asury Bonds	3%	A.O.	1945	Oct	1943	760,000.00	760,000.00	110	836,000.00	775,171.02	5,210.69	24,700.00	None	None	None	Yes	1933		765,076	None	1,060.
asury Bonds	2½%	M.S.	1960	Mar	1955	365,000.00	365,000.00	105	383,250.00	366,500.00	3,076.25	10,493.75	None	None	None	Yes	1935		366,232	None	76.
asury Bonds	2½%	M.S.	1951	Mar	1948	500,000.00	500,000.00	106	530,000.00	502,187.50	4,087.38	13,750.00	None	None	None	Yes	1937		501,858	None	202.
Totals						2,275,000.00	2,275,000.00		2,482,750.00	2,313,811.65	16,583.06	73,506.25	None	None	None				2,289,310.	None	2861

deposits required by State and Dominion Insurance Department, included above:

Description	Location	Purpose
U.S.Treasury Bonds 3 %	Department of Insurance State of Illinois	Regular deposit for State of Illinois
U.S.Treasury Bonds 2-7/8%	National Trust Co. Toronto	Regular deposit for Dominion of Canada

In statements to the New York Department all exchanges to report amortized values on amortizable securities and values basis for other securities in column 16.

Insert initial letters of months in which interest is payable.

†Perpetual bonds, bonds in default as to principal or interest, and bonds not amply secured, are to be entered in this column at market value.
‡Exchanges which use "Amortized Values" as "Book Values" may omit entering figures in these columns, and provide the following footnote: "The increase and decrease in amortized values are the same as those shown in columns for 'Increase and Decrease by Adjustment in Book Value' excepting as otherwise indicated."
NOTE—This supplemental information, required of all Exchanges which amortize their bonds, is not to be used as a substitute for the information required in the preceding columns but in addition thereto.

Supplemental columns for data concerning Amortization. — See Note

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SCHEDULE T—EXHIBIT OF PREMIUMS WRITTEN
Allocated by States and Territories

(May be filed not later than April 1st)

States, etc.	Gross Premiums, Less Return Premiums				Net Premiums	Dividends Paid or Credited to Policyholders, less Received on Reinsurance
	Direct Writings	Reinsurance Assumed From: Unauthorized Companies	Reinsurance Assumed From: Authorized Companies	Reinsurance Ceded To: Unauthorized Companies	Reinsurance Ceded To: Authorized Companies	
	(1)	(2)	(3)	(4)	(5)	(7)
Alabama	3,905 04				3,905 04	
Alaska	-				-	-
Arizona	321 56				321 56	153 [illegible]
Arkansas	15,726 95				15,726 95	7,386 [illegible]
California	297,488 48				297,488 48	139,728 [illegible]
Colorado	3,905 78				3,905 78	2,834 [illegible]
Connecticut	13,588 43				13,588 43	6,382 [illegible]
Delaware	32,385 48				32,385 48	15,211 [illegible]
Dist. Columbia	1,138 01				1,138 01	534 [illegible]
Florida	33,791 69				33,791 69	15,871 [illegible]
Georgia	6,775 71				6,775 71	3,182 [illegible]
Hawaii	19,336 02				19,336 02	9,082 [illegible]
Idaho	19,667 50				19,667 50	9,237 [illegible]
Illinois	98,252 56				98,252 56	43,330 [illegible]
Indiana	131,978 79				131,978 79	61,969 [illegible]
Iowa	55,865 15				55,865 15	25,300 [illegible]
Kansas	1,687 48				1,687 48	792 [illegible]
Kentucky	2,140 69				2,140 69	1,005 [illegible]
Louisiana	6,543 80				6,543 80	3,073 [illegible]
Maine	24,363 35				24,363 35	11,441 [illegible]
Maryland	105,696 72				105,696 72	49,657 [illegible]
Massachusetts	17,496 93				17,496 93	8,218 [illegible]
Michigan	71,497 70				71,497 70	33,582 [illegible]
Minnesota	74,050 09				74,050 09	34,780 [illegible]
Mississippi	944 14				944 14	443 [illegible]
Missouri	5,805 09				5,805 09	2,727 [illegible]
Montana	8,054 35				8,054 35	3,783 [illegible]
Nebraska	9,905 16				9,905 16	4,654 [illegible]
Nevada	-				-	-
New Hampshire	-				-	-
New Jersey	30,068 58				30,068 58	14,125 [illegible]
New Mexico	-				-	-
New York	298,284 87				298,284 87	140,102 [illegible]
No. Carolina	2,647 60				2,647 60	1,243 [illegible]
No. Dakota	-				-	-
Ohio	81,284 48				81,284 48	38,178 [illegible]
Oklahoma	49 58				49 58	23 [illegible]
Oregon	31,449 59				31,449 59	14,771 [illegible]
Pennsylvania	95,799 30				95,799 30	44,996 [illegible]
Rhode Island	1,894 21				1,894 21	889 [illegible]
So. Carolina	-				-	-
So. Dakota	12 76				12 76	5 [illegible]
Tennessee	2,176 00				2,176 00	1,022 [illegible]
Texas	23,196 84				23,196 84	10,895 [illegible]
Utah	33,056 82				33,056 82	15,526 [illegible]
Vermont	1,372 43				1,372 43	644 [illegible]
Virginia	19,013 05				19,013 05	8,930 [illegible]
Washington	60,514 81				60,514 81	28,423 [illegible]
West Virginia	8,311 11				8,311 11	3,905 [illegible]
Wisconsin	193,987 77				193,987 77	91,114 [illegible]
Wyoming	2,775 53				2,775 53	1,303 [illegible]
Canada	46,943 49				46,943 49	22,049 10
Cuba	-				-	-
Porto Rico						

Michigan	71,497	70												71,497	70	33,582	97
Minnesota	74,050	09												74,050	09	34,780	88
Mississippi	964	14												964	14	443	46
Missouri	5,809	09												5,809	09	2,725	88
Montana	8,094	35												8,094	35	3,783	28
Nebraska	9,505	16												9,505	16	4,464	32
Nevada	-													-		-	
New Hampshire	-													-		-	
New Jersey	30,088	58												30,088	58	14,125	84
New Mexico	-													-		-	
New York	298,284	87												298,284	87	140,102	75
No. Carolina	2,647	60												2,647	60	1,243	56
No. Dakota	-													-		-	
Ohio	81,284	48												81,284	48	38,178	87
Oklahoma	49	58												49	58	23	02
Oregon	31,449	59												31,449	59	14,771	70
Pennsylvania	95,799	30												95,799	30	44,996	30
Rhode Island	1,894	21												1,894	21	889	70
So. Carolina	-													-		-	
So. Dakota	12	76												12	76	5	92
Tennessee	2,176	00												2,176	00	1,022	36
Texas	23,196	84												23,196	84	10,895	43
Utah	33,096	82												33,096	82	15,526	60
Vermont	1,372	43												1,372	43	644	82
Virginia	19,013	05												19,013	05	8,930	82
Washington	60,514	81												60,514	81	28,423	47
West Virginia	8,311	11												8,311	11	3,905	28
Wisconsin	193,987	77												193,987	77	91,114	98
Wyoming	2,775	53												2,775	53	1,303	56
Canada	46,943	49												46,943	49	22,049	10
Cuba	-													-		-	
Porto Rico	-													-		-	
Philippine Is.	3,780	00												3,780	00	1,775	45
Mexico																	
Other foreign (Italian)																	

[fol. 446] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 447] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS AND DESIGNATION OF RECORD—Filed September 5, 1942

Come now the appellants and adopt their Assignments of Error as their Statement of Points to be relied upon, and represent that the whole of the record, as filed, is necessary for the consideration of the case, except plaintiffs' Exhibit 20, being a copy of the Illinois Insurance Code, and the bond and citation upon this appeal.

Dated this 3rd day of September, 1942.

Franklin D. Trueblood, Counsel for Appellants.

[fols. 448-449] The undersigned counsel for appellees hereby acknowledges due and timely service of the foregoing Statement of Points to be relied upon and designation of the parts of the record to be printed, and agrees that the said designation includes all parts of the record material and necessary to the consideration of the case, and hereby expressly waives all right to filing a counter-designation of parts of the record to be printed.

Dated this 3d day of September, 1942.

John J. Bennett, Jr., Attorney-General, Counsel for Appellees, by Milton Kaplan, Assistant Attorney-General.

[fol. 450] [File endorsement omitted.]

[fol. 451] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

ORDER NOTING PROBABLE JURISDICTION—October 12, 1942

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 46,859. New York, Supreme Court, Albany County. Term No. 358. Hoopeston Canning Co., E. Pritchard, Inc., et al., Appellants, vs. Louis H. Pink, Superintendent of Insurance of the State of New York, et al. Filed August 31, 1942. Term No. 358 O. T. 1942.

(3258)

FILE COPY

FILED
AUG 31 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 358

HOOPESTON CANNING CO., E. PRITCHARD, INC., ET AL.,

Appellants,

vs.

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION.

FRANKLIN D. TRUEBLOOD,
Counsel for Appellants.

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STATUTES CITED.

Constitution of the United States, 14th Amendment
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 358

HOOPESTON CANNING CO., A CORPORATION; E. PRITCHARD, INC., A CORPORATION; LANSING B. WARNER, INCORPORATED, A CORPORATION; HARRY M. BROWN AND JAMES T. SMITH, PAUL E. EMERSON AND BEN A. MORTON,

Appellants,

vs.

LOUIS H. PINK, AS SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AND JOHN J. BENNETT, JR., AS ATTORNEY-GENERAL OF THE STATE OF NEW YORK,

Appellees.

JURISDICTIONAL STATEMENT.

In compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, appellants submit herewith their statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain the appeal in the above entitled consolidated cause from a final order and judgment of the Court of Appeals of the State of New York dated June 5, 1942, and entered June 23, 1942, and from the final order and judgment of the Supreme Court of the State of New York, Albany County, entered thereon on June 23, 1942. Applications

for appeal was presented to the chief judge of the Court of Appeals of the State of New York on July 29, 1942, and by him refused. Application for said appeal to the Supreme Court of the United States was presented on August 6th, 1942.

(1) The statutory provisions which sustain the jurisdiction of the Supreme Court of the United States to entertain the appeal in this case are Section 237 (a) of the Judicial Code of the United States, as amended (28 U. S. C. A., Sec. 344 (a)), and Section 1 of the Act of Congress of January 31, 1928 (c. 14, 45 Stat. 54), as amended by the Act of Congress of April 26, 1928 (c. 440, 45 Stat. 466), which provide that the Supreme Court of the United States may review, upon appeal, a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity.

(2) The statutes of the State of New York, and portions thereof, the validity of which is drawn in question in this cause, are Section 130; Section 168, subsection 2; Section 410, subsection 1; Section 412, subsection 1; Section 413, subsection 2; Section 415, subsection 1; Section 415, subsections 1(d) and 1(e); Section 417, subsection 1; Section 418, subsections 1 and 3; Section 420; Section 421 and Section 422, subsection 1, of the Insurance Law of the State of New York (Chapter 882, found at pages 2530, et seq., in Volume 2, of the Laws of 1939 of the State of New York, being Chapter 28 of the Consolidated Laws of said State), which statutes are set out verbatim in the decision of the trial term attached hereto, marked "Exhibit A," and made a part hereof. The pertinent provisions of the aforesaid statutes may be summarized as follows: Section 130, as

construed by appellees prior to the commencement of these actions and by the Court of Appeals of the State of New York, requires all appellants' contracts of inter-insurance insuring New York risks to be issued, or effectuated through, or countersigned by, an agent resident in New York, although all such contracts are made and to be performed outside of said State; Section 168, subsection 2, requires contracts of inter-insurance on New York risks to conform in all particulars to the standard fire insurance policy of the State of New York; Section 410, subsection 1, imposes on the "Advisory Committee," subject to the Articles of Association and Power of Attorney, ultimate powers of management of the affairs of the subscribers; Section 412, subsection 1, prohibits anyone from cooperating in appellants' insurance who does not have net assets in excess of ten thousand dollars, without reference to the amount of insurance he may carry, or the cost for which he may be liable; Section 413, subsection 2, requires appellants to build up and maintain a special contingent surplus in a stated amount in such a manner as to deprive those exchanging the contracts of their individual ownership of the funds and to impose upon them a joint liability to the extent of their interest in said fund; Section 415, subsection 1, requires the Power of Attorney to be executed in a manner sufficient for the acknowledgment of conveyances of real estate in the State in which the subscriber is domiciled; Section 415, subsection 1(d) prescribes the method of electing members to the Advisory Committee, and Section 415, subsection 1(e), requires the Advisory Committee to make regulations for the control and custody of funds; Section 417, subsection 1, requires every contract of inter-insurance to provide for a contingent liability in an amount of not less than one nor more than ten times the amount of "the annual premium expressed in such contract;" Section 418, subsection 1, requires each subscriber to build up op-

erating reserves in an amount equal to the larger of (a) Twice the amount of the so-called annual premium, or (b) the subscriber's pro-rata share of an aggregate operating reserve of one-half of one per cent of the aggregate amount of insurance in force; Section 418, subsection 3, imposes a joint liability on each subscriber to the extent of the operating reserve; Section 420 subjects all appellants' assets and the aforesaid operating reserves to the payment of liabilities under the contracts of inter-insurance and thereby imposes a joint liability upon the subscribers to the extent of said assets; Section 421 requires each subscriber's account to be credited with premiums earned by him as an underwriter; and Section 422, subsection 1, requires appellants to maintain at least one office in the State of New York.

(3) For a statement of the nature of the case, the rulings of the State courts and the basis upon which it is contended that this Court has jurisdiction of this cause under Section 237(a) of the Judicial Code the appellants respectfully show:

The appellants brought two actions in the Supreme Court of the State of New York, Albany County, for a declaratory judgment and injunction under Section 473 of the New York Civil Practice Act on November 1, 1939, against the appellees Louis H. Pink, as Superintendent of Insurance of the State of New York, and John J. Bennett, Jr., as Attorney General of the said State, alleging that they sued on behalf of two groups of persons, firms, and corporations, known as subscribers who, scattered throughout the United States, exchange in Illinois pursuant to the laws of that State contracts of inter-insurance against loss or damage by fire; that the statutes, and portions thereof, above enumerated, as against appellants, are invalid as violative of Section 1 of the Fourteenth Article of Amendment to the Constitu-

tion of the United States, providing that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The appellees answered the complaints, and the actions having been consolidated, came on for trial. The appellants introduced evidence tending to establish invalidity of the statutes in question. At the conclusion of the trial the cause was submitted on the written briefs of the parties in which the questions arising under the Constitution of the United States were elaborately argued. The theory upon which the case was presented was that the statutes in question, as applied to appellants, were invalid under the due process clause for lack of jurisdiction because all contracts of appellants are made and to be performed outside of the State of New York; that the statutes, except Section 130, the countersignature statute, are invalid under the due process clause on the ground of unreasonable regulation; and that Section 412, subsection 1, prohibiting a person from participating in this insurance who does not have a net worth of more than ten thousand dollars, is also invalid under the equal protection clause because of a discrimination against the small business man who cannot qualify thereunder; that Section 418, subsection 1, requiring appellants to build up and maintain reserves in excess of the reserves required of insurance companies is likewise invalid under the equal protection clause because a discrimination against appellants, as is Section 417, subsection 1, requiring every contract of inter-insurance to provide for a contingent liability in an amount of not less than one nor more than ten times the amount of "the annual premium expressed in such

contract," whereas Section 345, subsection 1, of the said Insurance Law provides no limitation whatever to the contingent liability of members of a mutual fire insurance company.

On December 10, 1940, the Court handed down its decision, a true copy thereof marked "Exhibit A" being hereto attached and made a part hereof, sustaining appellants' contentions under the equal protection clause as to Section 412, subsection 1, and Section 418, subsection 1, but denying the contention as to Section 417, subsection 1; and sustaining in part appellants' contentions under the due process clause as to unreasonable regulation, the Court holding the remainder of the statutes to be valid and constitutional. Said decision declared the statutes to be valid and applicable under the due process clause on the ground of jurisdiction except that it held that Section 130 (the countersignature statute) had no application to appellants' contracts, all of which were issued, delivered or otherwise effectuated outside the State of New York. Appellants submitted requests to the Trial Term to find each of the statutes, except Section 130, invalid under the Constitution of the United States, which were refused except as to Section 412, subsection 1; Section 418, subsection 1; Section 418, subsection 3; and Section 421, which were allowed. Final judgment based on the aforesaid decision was entered in the Supreme Court, Albany County, on April 5, 1941, a true copy thereof marked "Exhibit B" being hereto attached and made a part hereof.

Within the time prescribed by Section 612 of the New York Civil Practice Act both sides appealed from the aforesaid final judgment of the Trial Term to the Appellate Division of the Supreme Court, Third Department. Appellants in their Notice of Appeal, a true copy thereof marked "Exhibit C" being hereto attached and made a

part hereof, specifically stated that they appealed from the judgment of the Trial Term holding the statutes enumerated in said Notice of Appeal to be valid and constitutional. The appeal having been perfected, the Federal constitutional questions were argued before the Appellate Division both orally and in the briefs. On July 2, 1941, the Appellate Division filed its decision, a true copy thereof marked "Exhibit D" being attached hereto and incorporated herewith, reversing the judgment of the Trial Term and declaring all of the statutes in question to be invalid and inapplicable as against appellants because violative of the Constitution of the United States. In its final order of reversal, a true copy thereof marked "Exhibit E" being hereto attached and made a part hereof, the Appellate Division found that appellants' contracts of interinsurance are neither made nor performed in the State of New York, that appellants have no resident agents in the said State, that appellants have no representatives, resident or otherwise, empowered to receive an application, issue a policy, adjust or pay a loss within the confines of the State of New York, and that appellants do not solicit Subscribers. A judgment giving effect to the foregoing order of reversal was entered in the Supreme Court on September 2, 1941, a true copy thereof marked "Exhibit F" being hereto attached and made a part hereof.

Within the time prescribed by Section 592 of the New York Civil Practice Act the appellees filed a Notice of Appeal, a true copy marked "Exhibit G" being hereto attached and made a part hereof, to the Court of Appeals of the State of New York from each and every part of the aforesaid final order of reversal and judgment. The appeal having been perfected, the cause came on for hearing, and the Federal constitutional questions were again argued orally and in the briefs. On June 4, 1942, the

Court of Appeals filed its decision, a true copy marked "Exhibit H" being hereto attached and made a part hereof, reversing the final order of reversal of the Appellate Division.

By an order and judgment dated June 5, 1942, a true copy thereof marked "Exhibit I" being hereto attached and made a part hereof, the Court of Appeals reversed the aforesaid order of reversal of the Appellate Division and judgment based thereon and remitted the records and proceedings in the case to the Supreme Court, State of New York. Thereupon, on June 23, 1942, the Supreme Court, Albany County, ordered that the aforesaid order and judgment of the Court of Appeals be made the order and judgment of said Supreme Court. A true copy of said order of the Supreme Court is annexed hereto marked "Exhibit J" and made a part hereof. And on the same day, to-wit, June 23, 1942, a final judgment dismissing the complaints and for costs was duly entered by the Supreme Court, Albany County, a true copy thereof marked "Exhibit K" being hereto attached and made a part hereof.

The question whether Section 130, Section 168, subsection 2; Section 410, subsection 1; Section 412, subsection 1; Section 413, subsection 2; Section 415, subsection 1; Section 415, subsections 1(d) and 1(e); Section 417, subsection 1; Section 418, subsections 1 and 3; Section 420; Section 421; and Section 422, subsection 1, of the Insurance Law of 1939 of the State of New York as applied to appellants violate the due process and equal protection clauses of the Fourteenth Amendment was therefore raised in the complaints filed by appellants in the Court of first instance, passed upon by the Trial Term, presented to the Appellate Division and decided by that Court in favor of appellants, presented by appellees to the Court of Appeals, and decided by that Court against appellants. It is evident,

therefore, that appellants have exhausted their remedies in the State courts and have obtained a decision by the highest State court in which a determination of this cause is obtainable, and therefore this Court has jurisdiction of this cause under Section 237 (a) of the Judicial Code.

(4) For a statement of the grounds upon which it is contended that the questions involved are substantial the appellants respectfully show:

The appellants comprise two groups of carefully selected persons, firms, and corporations, known as Subscribers, who cooperate in carrying their own fire insurance at actual cost, which the State of New York is now seeking to regulate. One of these groups is confined to Subscribers engaged in the canning industry, while the other group is limited to Subscribers engaged in the wholesale grocery business and allied lines. Insurance is effected by exchanging under the Illinois law contracts of indemnity of a private nature, in which each Subscriber assumes an individual and several liability for his proportionate part of any loss. As a fund out of which this liability is paid, each Subscriber deposits funds which remain his separate property until used or returned. The Subscribers in the canners group have on hand aggregate deposits exceeding four million dollars; the Subscribers in the wholesale grocery group have on hand aggregate deposits exceeding one and one-half million dollars. Roughly, about ten per cent of the Subscribers reside in the State of New York, and both groups are licensed in that state. The canners group, using the same Power of Attorney throughout, has been in existence thirty-five years, while the wholesale grocers group, using substantially the same Power of Attorney throughout, has been in existence for thirty years.

The record contains the uncontradicted evidence of appellants' officer that the application of a majority of these

New York statutes to appellants would destroy their system of cooperative insurance. In the opinion of the witness what is at stake is not a mere matter of increased expense, serious as that would be, or of increased inconvenience in the pursuit of the cooperative plan, but the right of business men of good character to cooperate with one another in carrying their own insurance as they have carried it for the past thirty to thirty-five years. It is in evidence that appellants' loss ratio is only about one-half the loss ratio of ordinary insurance carriers, while, through the elimination of the agency system, common to practically all insurance companies, appellants save approximately twenty-five per cent in insurance costs. No insurance in America is comparable to the system here under review.

Under Section 41, subsection 3, of the Insurance Law of New York as construed by the Court of Appeals in this case, the appellants are doing an insurance business in the state as to local risks, although all contracts are made and to be performed outside of New York. Under Section 40, subsection 1, and Section 410, subsection 2, of the Insurance Law no person, firm, association or corporation shall do an insurance business in New York unless licensed. Section 5 makes every violation of the Insurance Law a misdemeanor punishable under the general law. Thus, even if they desired to do so, appellants could not escape regulation by surrendering their New York licenses. But, as this Court knows, the giving up of a license in the field of insurance is always accompanied by danger to the reputation of the insurer, as such a course subjects the insurer to the whispered attacks of unscrupulous and malicious persons. Patterson, *The Insurance Commissioner in the United States*, pp. 90, 91.

The appellants respectfully submit that the questions under the Constitution of the United States properly raised and necessarily decided by the state courts and now before

this Court on appeal are substantial federal questions within the rule of *McArthur* v. *United States*, 315 U. S. —, and *Zucht* v. *King*, 260 U. S. 174, 176, 177. The Court of Appeals did not cite a single authority in the Supreme Court of the United States to support its decision. It ignored the relevant authorities in this Court cited by appellants to sustain the decision of the Appellate Division. The sole authority cited by the Court of Appeals was a District Court case, *Firemen's Ins. Co.* v. *Beha*, 30 F. (2d) 539 (affirmed on a procedural point by this Court in 278 U. S. 580). The Appellate Division, however, in sustaining appellants' contentions of invalidity, cited *Allgeyer* v. *Louisiana*, 165 U. S. 578, 591; *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U. S. 346, 349; *Aetna Life Ins. Co.* v. *Dunken*, 266 U. S. 389, 399; and *Minn. Commercial Men's Association* v. *Benn*, 261 U. S. 140, 145.

The appellants contend that the challenged statutes violate the due process clause of the Fourteenth Amendment on the ground that New York has no jurisdiction over appellants' contracts of inter-insurance made and to be performed outside the state, even though the property insured and the owner thereof are in the state, and secondly, that the statutes alleged in the complaints are unreasonable, arbitrary and capricious without any reasonable relation to the end sought to be attained. Appellants also contend that the statutes violate the equal protection clause of the Fourteenth Amendment in that Section 412, subsection 1, prohibits a person from participating in this insurance who does not have a net worth of more than ten thousand dollars and therefore is a discrimination against the small business man who cannot qualify; that Section 418, subsection 1, discriminates against appellants by requiring them to build up and maintain reserves in excess of the reserves required of insurance companies; and that Section 417, subsection 1, requires every contract of inter-insurance

to provide for a contingent liability in an amount of not less than one nor more than ten times the amount of "the annual premium expressed in such contract," whereas Section 345, subsection 1, of the said Insurance Law provides no limitation whatever to the contingent liability of members of a mutual fire insurance company. The Trial Term sustained appellants' contentions under the equal protection clause as to Section 412, subsection 1, and Section 418, subsection 1, but not as to Section 417, subsection 1, and also sustained appellants' contention in part as to reasonable regulation, but denied appellants' contention of lack of jurisdiction under the due process clause. As previously noted, the Appellate Division reversed the Trial Term as to jurisdiction and held all of the statutes inapplicable and invalid as violative of the federal constitution.

This Court has held on a number of occasions that a state has no jurisdiction to regulate contracts of insurance relating to risks within its limits between a citizen and non-resident insurers made and to be performed in another state.

St. Louis Cotton Compress Co. v. *Arkansas*, 260 U. S. 346, 349.

Aetna Life Ins. Co. v. *Dunken*, 266 U. S. 389, 399.

Allgeyer v. *Louisiana*, 165 U. S. 578, 591.

Mutual Life Ins. Co. v. *Cohen*, 179 U. S. 262, 269.

See also:

Baldwin v. *Seelig*, 294 U. S. 511, 521,

This Court has indicated that statutes imposing regulations of the same general type as those imposed by the statutes here challenged, and under circumstances generally similar to the circumstances of this case, are invalid under the due process clause, because unreasonable, arbitrary, and capricious, without any reasonable relation to the object sought to be attained.

Nebbia v. *New York*, 291 U. S. 502, 525.
McLean v. *Arkansas*, 211 U. S. 539, 548.
C. B. & Q. Railroad Co. v. *McGuire*, 219 U. S. 549, 569.

This Court has ruled, under circumstances generally similar to the circumstances here involved, that statutes that impose the same general type of regulations and prohibitions as those imposed by the aforesaid Section 412, subsection 1; Section 418, subsection 1; and Section 417, subsection 1, are invalid under the equal protection clause.

Frost v. *Corporation Commission*, 278 U. S. 515, 522.
Hartford S. B. I. & I. Co. v. *Harrison*, 301 U. S. 459, 461.
Mayflower Farms v. *Ten Eyck*, 297 U. S. 266, 272, 274.
Concordia Fire Ins. Co. v. *Illinois*, 292 U. S. 535, 545, 549.
Louisville Gas & E. Co. v. *Coleman*, 277 U. S. 32, 37.
Engel v. *O'Malley*, 219 U. S. 128, 138.

See also:

Edwards v. *California*, 314 U. S. 160.

This Court has frequently ruled that a state may not compel non-resident insurers to give up rights guaranteed by the federal constitution as a condition to the granting or retaining of a license.

New York Life Ins. Co. v. *Head*, 234 U. S. 149, 163.
Hanover Fire Ins. Co. v. *Harding*, 272 U. S. 494, 507.
Fidelity & Deposit Co. v. *Tafoya*, 270 U. S. 426.
Terral v. *Burke*, 257 U. S. 529.
Palmetto Fire Ins. Co. v. *Conn.*, 272 U. S. 295, 304.

The questions here presented for determination have therefore been decided by the prior decisions of this Court in favor of the appellants and are substantial questions deserving review.

(5) The following cases support the jurisdiction of the Supreme Court of the United States in this cause:

Nashville, C. & St. L. R. Co. v. *Wallace*, 288 U. S. 249;
Home Ins. Co. v. *Dick*, 281 U. S. 397, 405;
New York Life Ins. Co. v. *Head*, 234 U. S. 149, 159, 160;
Mayflower Farms v. *Ten Eyck*, 297 U. S. 266;
New York ex rel. Bryant v. *Zimmerman*, 278 U. S. 63, 67, 68;
Dorchy v. *Kansas*, 272 U. S. 306, 308, 309;
Chicago Life Ins. Co. v. *Needles*, 113 U. S. 574, 579;
Bell's Gap R. R. Co. v. *Pennsylvania*, 134 U. S. 232, 236.

Respectfully submitted,

HOOPESTON CANNING CO.,
E. PRITCHARD, INC.,
LANSING B. WARNER, INCORPORATED,
HARRY M. BROWN,
JAMES T. SMITH,
PAUL E. EMERSON,
BEN A. MORTON,
Appellants,

By FRANKLIN D. TRUEBLOOD,
Their Counsel.

EXHIBIT "A".

SUPREME COURT OF THE STATE OF NEW YORK,
ALBANY COUNTY.

HOOPESTON CANNING CO., a Corporation, E. PRITCHARD, INC., a Corporation, Lansing B. Warner, Incorporated, a Corporation, Harry M. Brown and James T. Smith, Plaintiffs,

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and John J. Bennett, Jr., as Attorney General of the State of New York, Defendants

HOOPESTON CANNING CO., a Corporation, E. PRITCHARD, INC., a Corporation, Lansing B. Warner, Incorporated, a Corporation, Paul E. Emerson and Ben A. Morton, Plaintiffs,

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and John J. Bennett, Jr., as Attorney General of the State of New York, Defendants

Albany Trial Term—March 1940

Wiswall, Walton, Wood & McAffer, Esqs., for plaintiffs.
Zane, Trueblood & Johnson, Esqs., of counsel.
John J. Bennett, Jr., Attorney General for defendants.
Vincent Kiebala, Assistant Attorney General, of counsel.

Opinion, by Schirick, J.

Two actions have been tried together, before the Court without a jury. The action in which Ben A. Morton is a party plaintiff will, for convenience, be referred to as the first action. The action in which James T. Smith is a plaintiff will, for like reason, be referred to as the second action.

The first action is brought on behalf of approximately twenty one hundred persons, firms, and corporations, of whom some two hundred and thirty are residents of the State of New York. All of these persons are engaged in the wholesale grocery business. Since 1912 they have ob-

tained insurance against loss by fire by a system of reciprocal insurance devised and operated by the plaintiff, Lansing B. Warner, Inc., an Illinois corporation. The system contemplates that each member, called a "subscriber," exchange contracts of insurance with every other member of the group. The agency through which the exchange is effected is Lansing B. Warner, Inc., as attorney in fact. The group is designated as Warner Reciprocal Insurers. The group is not associated nor united in any manner, save in the common aim to secure this type of insurance. One seeking to obtain such insurance must file an application with the Agent in Chicago, and execute a document known as Appointment of Agent. By virtue of this appointment, the agent, Lansing B. Warner, Inc., is authorized to execute, in his behalf, contracts of insurance. The Agent selects the individuals, firms, or corporations to be admitted to the scheme. It maintains a staff to service the risks. It receives proofs of loss and is empowered to compromise and pay claims.

Annually each subscriber makes a "deposit" with the Agent of a sum which roughly corresponds with the premium which would be charged by an "old line" company upon a similar risk. Title to such deposit remains in each subscriber. The liability of each subscriber is several, and is limited in amount to the sum deposited by him, and also the amount of his "reserve". The liability of each subscriber on any loss is fixed by the ratio of that subscriber's deposit to the total deposits. The Agent retains twenty percent of the deposit as its compensation, out of which operating expenses must be paid. That portion of the deposit which remains unused after the payment of losses and agent's compensation each year is known as a "saving". A portion of this is used to build up a reserve fund. One-fifth of it is given to the Agent as additional compensation. The balance is annually returned to the subscriber.

The Appointment of Agent provides for the appointment of "Advisers". These meet periodically. Their functions are largely limited to the deposit and investment of assets, and the countersigning of checks. They do not supervise the Agent, nor do they exercise authority over him. The Agent is the ultimate power in the scheme.

The second action involves a similar reciprocal insurance group. This group is composed of nine hundred seventy-six persons, firms, and corporations, engaged in the canning industry. Ninety three of these are located in New York State. This group is known as Canners Exchange Subscribers at Warner Inter-Insurance Bureau. This group, with minor exceptions, is identical in operation with the Warner Reciprocal Insurers.

By virtue of Chapter 882 of the Laws of 1939, the Insurance Law of the State of New York, was extensively revised. Various provisions were enacted which purport to regulate the activities of reciprocal insurers. The plaintiffs maintain that such regulations may not constitutionally be applied to them. They assert that if applied to them, these provisions would constitute a deprivation of their property without due process of law. The actions have been brought for a declaratory judgment declaring such provisions to be invalid as against the plaintiffs and for an injunction restraining the defendants from enforcing such law.

Lansing B. Warner, Inc., as agent or attorney in fact, of both groups, has been extremely zealous to localize the activities of these groups in the City of Chicago, Ill.

Application blanks, and blank forms for a power of attorney, are mailed to the prospective subscribers from the Chicago office. These are returned to Chicago by mail. To determine such prospect's eligibility, the Attorney-in-Fact makes an investigation of his credit rating and reputation for honesty. A trained insurance engineer is sent out from Chicago to inspect the property and report his findings. He also may advise the prospective subscriber as to the methods whereby the risk may be decreased. Existing subscribers are consulted regarding the desirability of admitting the applicant to the scheme.

If satisfied with his qualifications, the Attorney-in-Fact accepts the applicant's Power of Attorney. Thereupon, he executes a contract of inter-insurance, and mails it to him from Chicago. The deposit is sent to Chicago by mail.

Once the power of attorney has been executed and accepted, it continues in force until revoked. The subscribers in both groups have been fairly constant. New applications are not frequent.

Losses are paid at the discretion of the Attorney-in-Fact and checks are sent by mail from the Chicago office. In the event of an unusual loss, an inspector is sent to view the property. He has not authority to enter into an adjustment.

There are no agents. New applications are not solicited, save such recommendations as a subscriber may make to his friends and associates. It is not disputed that the record of these groups has been high, both in their financial standings, and in their payment of losses. It is conceded that the subscribers have saved from thirty to fifty per cent in the cost of their fire insurance by reason of their use of this method of reciprocal insurance. The reasons for such savings are mainly two: 1) the elimination of the agency system, with its costly commissions, 2) careful selection of subscribers, resulting in a lower loss ratio than among ordinary companies.

Both groups are licensed to transact insurance business in the State of Illinois. Since 1930 they have been also licensed in New York. This has been done, the plaintiffs assert, to secure two advantages 1) the appointment of the Superintendent of Insurance as agent for the service of process in New York, and 2) the filing of annual financial statements. They deny that they have been under any obligation to secure such license. Since 1936, they have been paying a tax upon their net income received from subscribers in New York State, though not admitting the validity of such tax. It is stipulated that their activities have been in a substantial compliance with the law as it existed prior to the enactment of the Insurance Law of 1939. It is stated in the complaints in both actions that they are desirous of qualifying under the valid provisions of the new law and of securing a license thereunder.

The following provisions of the Insurance Law are here challenged:

Sec. 130 (1) "Except as provided in subsection two, no licensed foreign or alien insurer shall in this state issue, deliver or otherwise effectuate any contract of insurance covering either persons resident in this state or property situated in this state, or covering any risk incident to the

performance or non-performance of any contract or obligation to be performed in this state, or covering any risk incident to any obligation or duty which is governed by the laws of this state though actually to be performed elsewhere, unless such contract of insurance is issued or effectuated through, or countersigned by, a resident licensed insurance agent of this state. Within the meaning of this section, a licensed individual insurance agent shall be deemed to be resident in this state if he has his domicile or his principal place of business in this state, and a licensed corporation insurance agent shall be deemed to be resident in this state if it maintains a lawfully established place of business in this state; and a licensed firm or association insurance agent shall be deemed to be resident in this state if it maintains an established place of business in this state."

Sec. 168 (2). "No policy or contract of fire insurance, including a renewal of such policy or contract, shall be made, issued or delivered by any insurer or by any agent or representative thereof, on any property in this state, unless it shall conform in all particulars as to size of type, as to location of blank spaces, and as to all provisions, agreements and conditions, with such printed blank form of policy (the standard form of the National Convention of Insurance Commissioners); and no other or different provision, agreement or condition shall be in any manner made a part of such contract or policy, except as follows:"

Sec. 410 (1) "Within the meaning of this chapter the term "reciprocal insurer" shall mean any aggregation of persons, firms or corporations, herein called "subscribers", who or which under a common name engage in the business of inter-insurance or exchanging contracts of insurance on the reciprocal plan through an attorney-in-fact having authority to obligate the subscribers severally, within such limits as may lawfully be specified in the power of attorney, on contracts of insurance made with any subscriber as a policyholder through such attorney-in-fact acting on behalf of all other subscribers. For the purposes of this chapter, the term "reciprocal insurer" shall include any reciprocal

or inter-insurance exchange, by whatever name known, and any reference thereto as an insurer shall be deemed to mean any such aggregation of inter-insurers operating through an attorney-in-fact individually and collectively as an insurance organization for the benefit of its policyholders. The term "advisory committee" as used in this chapter, shall be deemed to include any official body, by whatever name called, which is chosen by the subscribers of a reciprocal insurer, and which has, subject to the articles of association and subscribers agreement, ultimate power and responsibility and control of the affairs of a reciprocal insurer."

Sec. 412 (1) "No authorized reciprocal insurer shall make any new agreement for insurance with any person, firm or corporation who or which does not have assets in his, their or its own right in an amount not less than ten thousand dollars in excess of liabilities, as shown by a commercial agency report, as hereinafter provided, or by a sworn statement on file with the attorney-in-fact, verified by such subscriber or by an officer of a corporation subscriber.

Before renewing a contract of insurance with a subscriber, similar proof of financial responsibility shall be required, unless the subscriber has accumulated and maintains the subscriber's operating reserve required by section four hundred eighteen. The report of an established commercial agency having one hundred thousand or more subscribers shall be deemed presumptive evidence of the financial condition of a subscriber."

Sec. 413 (2) "Every authorized reciprocal insurer, at the end of the first and every succeeding calendar year following the effective date of this chapter, and in the case of a reciprocal insurer hereafter authorized, at the end of each full calendar year of doing business in this state, shall accumulate and maintain a special contingent surplus or guaranty surplus, by whatever name called, at the rate of one per cent of its net premium income for each such year as reported in its annual statement, until such contingent surplus shall be at least equal to the amount of minimum

surplus required in section four hundred eleven. Such contingent surplus shall not be impaired by dividend distributions or by refunds or returns of continuing or retiring subscribers' reserves or deposits except in the event of the liquidation of such reciprocal insurer under order of a court. Any such reciprocal insurer may set aside the entire amount of the contingent surplus herein required or accumulate such surplus at a rate in excess of that herein required; but such contingent surplus once set aside, shall be thereafter maintained unimpaired except as to the amount, if any, in excess of the minimum surplus required by section four hundred eleven."

Sec. 415: (1) "Every subscriber of an authorized reciprocal insurer shall have executed a subscriber's agreement, and every subscriber hereafter executing such a subscriber's agreement shall execute and duly acknowledge the same, in a manner sufficient for the acknowledgment of conveyances of real property to be recorded in the state in which such subscriber is domiciled, and every subscriber's agreement shall be identical in terms, except as to the date and the name and address of the subscriber, with all other subscriber's agreements currently in force and effect with all other subscribers of such reciprocal insurer. Every such subscriber's agreement shall contain in substance the following provisions:

* * * * * * *

(d) A provision that there shall be an annual meeting of the subscribers, in person or by proxy, at a time and place to be determined in accordance with such agreement, of which each subscriber shall be duly notified and at which each subscriber shall have power to vote in person or by proxy for all members of the advisory committee to be chosen or appointed at such time."

Sec. 417: (1) "Every contract of insurance and every power of attorney of the attorney-in-fact or subscriber's agreement under or by which contracts of insurance are issued or exchanged by any authorized reciprocal insurer shall provide for a contingent several liability for assess-

ment of the subscriber as an inter-insurer on the risks of every other subscriber in an amount not less than one nor more than ten times the amount of and in addition to the annual premium expressed in such contracts of insurance issued to the subscriber by the reciprocal insurer."

Sec. 418: 1. "Every subscriber of an authorized reciprocal insurer shall be required to accumulate a minimum operating reserve, to be credited to such subscriber on the books and records of such reciprocal insurer, by authorizing the attorney-in-fact to credit to such account at the end of the fiscal year of such reciprocal insurer, an amount not less than one quarter of such subscriber's earnings as an underwriter during such period. Such accumulation shall be made if and at least so long as such subscriber's operating reserve is less than the larger of the following amounts: (a) Twice the amount of the annual premium or premiums in force as of such date on all policies issued to such subscriber by the reciprocal insurer: or (b) such subscriber's pro rate share, determined on the basis of annual premiums in force, of an aggregate operating reserve for such reciprocal insurer equal to one-half of one per cent of the aggregate amount of fire insurance in force in such reciprocal insurer as of such date."

3. "No subscriber shall have a secured or preferred claim against any assets of the reciprocal insurer arising out of such operating reserve, but all assets held by such insurer shall be available for the payment of claims of policyholders and creditors of such a reciprocal insurer in preference to any claim for withdrawal by a subscriber as such. Any subscriber's operating reserve accumulated by any such reciprocal insurer shall be maintained at all times, except that a subscriber may, upon withdrawal from membership and cancellation of all insurance contracts held by him in such insurer, and after giving to the attorney-in-fact written notice of withdrawal at least sixty days in advance, withdraw the amount of his operating reserve less such surrender charges as may be deducted pursuant to the subscriber's agreement. No such withdrawal shall be permitted after an order of liquidation, of, or the appointment

of a receiver or liquidating trustee for, any such reciprocal insurer."

Sec. 420: "All of the assets of any reciprocal insurer including subscribers' operating reserves shall be liable primarily for payment of all liabilities incurred under its policies or other contracts. No part of the surplus funds of such reciprocal insurer shall be subject to the claims of general creditors of any of the individual subscribers of such insurer until all policies under which any such subscriber is obligated have been terminated and in no event beyond the amount of such subscriber's operating reserve. The contingent liability of subscribers for additional premiums or assessments shall not be included as an asset in the financial statement of a reciprocal insurer. Subscribers' operating reserves for which notice of withdrawal has been given shall be reported as liabilities until paid. In any statement or report of the financial condition of a reciprocal insurer filed in this state, the surplus to policyholders, after providing for the unearned premium reserves, loss reserves and other liabilties, as required by this chapter, shall be reported as follows: 1. Special contingent surplus; 2. Subscribers' operating reserves; 3. All other surplus, if any."

Sec. 421: "The attorney-in-fact, in addition to the books of account of the collective transactions of all subscribers of the reciprocal insurer, shall keep and maintain a separate account for each individual subscriber, setting forth the entries determining the operating reserve, if any, of such subscriber. Each subscriber's account shall be credited with the premiums earned by him as an underwriter on the policies issued by the exchange and charged with his proper share of all losses incurred under such policies as well as with the expenses incurred by the insurer. Earnings and interest income from investments of all subscribers' operating reserves shall be apportioned and credited to subscribers on the basis of their accumulated operating reserves and all other interest and investment income may be apportioned and credited to the subscribers on the basis of their premiums earned as underwriters."

Sec. 422: 1. "The superintendent may, in his discretion, pursuant to section forty-two, issue a license to a reciprocal insurer domiciled in, or organized under the laws of another state or of any province of the Dominion of Canada, to do in this state such kind or kinds of insurance business as a domestic reciprocal insurer may be authorized to do in this state. Such foreign or alien reciprocal insurer shall comply with substantially the same requirements of this chapter which are applicable to domestic reciprocal insurers hereafter to be organized and authorized to do the same kind or kinds of insurance business and in addition every such alien reciprocal shall be subject to the provisions of this chapter relating to alien insurance companies authorized to do the same kind or kinds of insurance business. Nothing herein contained shall be deemed to require that the attorney-in-fact of a foreign or alien reciprocal insurer shall be resident or domiciled in this state, or shall maintain his or its principal office in this state, or shall be organized under the laws of this state; but every authorized reciprocal insurer shall maintain at least one office in this state."

Sec. 40: 4. "The superintendent may issue a license to any insurer to do in this state the kind or kinds of insurance business for which such insurer is qualified under the provisions of this chapter and under its charter. Every such license shall contain the name of the licensee, its home office address, its principal place of business in this state, the state or country under whose laws it was organized or incorporated, the kind or kinds of insurance business, as defined in this chapter, which it is authorized to do in this state, and the term of such license. The superintendent may refuse to issue or renew any such license if in his judgment such refusal will best promote the interests of the people of this state."

The attack upon the validity of this legislation is based upon the fourteenth Amendment of the Constitution of the United States, the relevant part of which reads as follows:

"• • • No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It has been established by the Supreme Court of the United States that a corporation is not a citizen within the meaning of the equal immunities clause. Paul v. Virginia, 8 Wall. 168.

Corporations do, however, come within the protection of the due process clause. Connecticut General Life Ins. Co., v. Johnson, 303 U. S. 77.

It is contended by the plaintiffs that this legislation and the determination of the defendants to enforce it, constitute a violation of the due process clause. This contention is put forward upon two grounds:

First: That the State of New York has no jurisdiction over the activities of the plaintiff and therefore may not regulate them.

Second: That even if the State had jurisdiction, the regulations which are attacked are arbitrary and unreasonable and without any reasonable relation to the object sought to be attained.

These two grounds deserve and will receive separate consideration.

First, the Court will consider the question of the jurisdiction of the State of New York over these plaintiffs.

It has not been, and can not be, disputed that the documents exchanged by the plaintiffs are insurance contracts; nor that the exchange of them constitutes the carrying on of insurance business. *People v. Roschli,* 275 N. Y. 26.

Neither can it be seriously disputed, in view of the authorities, that the contracts exchanged by the plaintiffs are Illinois contracts. The applications are received in Chicago and they are accepted there. Policies are mailed from Chicago. This makes them, as a matter of law, Illinois contracts of insurance. Minnesota Assn. v. Benn, 261 U. S. 140; Huntington v. Sheehan, 206 N. Y. 486; Stone v. Penn Yan, K. P. & B. Railway, 197 N. Y. 279.

The questions remaining to be considered upon the matter of jurisdiction are 1) whether the plaintiffs are doing business within this state, and 2) whether the State of New York has other interests in these policies, sufficient to justify their regulation.

The evidence discloses the following acts in relation to these policies performed in New York State:

When a canner or wholesale grocer, resident of New York, applies for insurance under this reciprocal scheme, an engineer is sent from the Chicago office. He inspects the property in this state. He explains the operation of the plan. He may have an application blank in his possession and if so, may deliver it to the applicant. Upon acceptance of the application, these engineers "service" the risk. This term is insurance jargon, having reference to the giving of advice, preparation of plans, and other activities which have the purpose of minimizing the risk of fires. In the event of an unusual loss in this state, an inspector is sent from Chicago to examine the premises, in order to determine its extent, and also to discover the cause of the fire, in order that future losses from the same cause may be prevented.

These activities, in the opinion of the Court, are such as to constitute doing business in this state. In reaching this conclusion, the Court puts out of its consideration the fact that the plaintiffs are licensed to do business here. Concededly, a license to do business is not equivalent to doing business. The license may or may not be used. People ex rel. Sea Island Insurance Co. v. Graves, 274 N. Y. 312.

In *Thomas Canning Co. v. Canners Exchange*, 219 Mich. 214, some of the plaintiffs herein were involved. The Court stated, page 222:

"In the name adopted by 'such subcribers contracting among themselves' they have, through their attorney, qualified to carry on their co-operative system of insurance in this State. To the extent the attorney directly or through authorized agents operates in this State by soliciting applications from subscribers for insurance on property within the State, inspects and appraises such property

for that purpose, issues and delivers policies, investigates and pays or adjusts losses through its representative adjuster, or engages in that connection in other insurance activities, it is doing business in this State regardless of whether the policies it issues are to be construed as contracts made in this or another State. Seamans v. Temple Co., 105 Mich. 400 (28 L. R. A. 430, 55 Am. St. Rep. 457)."

The Court would be of this opinion even if the plaintiffs were entities, like corporations, resident of Illinois. The plaintiffs insist, however, that they are not. The names, Warner Reciprocal Insurers, and Canners Exchange Subscribers at Warner Inter Insurance Bureau, are merely convenient terms, they insist, to designate those individuals, firms and corporations which have appointed a common agent or attorney-in-fact to exchange policies of fire insurance. This being so, the acts of the individual members, in reference to such insurance, consummated in this state, must be taken into consideration in weighing the issue whether the plaintiffs are doing business in New York. The plaintiffs can not at the same time "blow hot and cold". Various such acts take place in this state. The reciprocal plan is suggested and recommended by resident subscribers to friends and associates. Questions propounded by the Attorney-in-Fact as to the reputation and standing of applicants are here answered. These are activities of the plaintiffs, and constitute the transaction of insurance business in this state.

The plaintiffs have cited a long line of cases showing that certain acts within a state do not amount to doing business therein. These cases have been carefully examined by the Court and they appear to be clearly distinguishable by reason of one important feature. That is, that the acts done within the state in those cases were done not by the insurance companies, nor by anyone authorized to act on their behalf, but by the insured, or the representatives of the insured.

Thus in the leading case of Allgeyer v. Louisiana, 165 U. S. 578, the act done within the state was the mailing of a notice describing cargoes to be shipped, for the purpose of effecting their inclusion under an open marine policy.

This act was performed not by the insurance company or its agent, but by the insured.

In N. Y. Life Ins. Co. v. Dodge, 246 U. S. 357, as in N. Y. Life Ins. Co. v. Head, 234 U. S. 149, which the Dodge case follows, all acts by the insurance company with reference to the loan agreement were performed elsewhere. All the acts done within the state with reference to such agreement were performed by the insured.

In *People v. Van Amridge*, 266 N. Y. 277, the acts done by the labor union, pursuant to the terms of a group life insurance policy, were done on behalf of its members, the insured, and not on behalf of the insurer. The activities of the insurance company were limited to the District of Columbia, so far as the policy was concerned.

It may be contended however, that even if the plaintiffs are doing business within the State of New York, this does not justify the regulation sought to be imposed; that the doing of business within a state offers no valid ground for the regulation of business done without the state, nor can a state, as a condition for the granting of a license to do business therein, compel a corporation to submit to control of its transactions elsewhere. It is a principle firmly established in our constitutional law, that a state cannot use a conceded power in order to accomplish an unconstitutional result.

In *Fidelity & Deposit Co. v. Tafoya*, 270 U. S. 426, 434, Justice Holmes states the principle as follows:

"Coming then to the merits, we assume in favor of the defendants that the State has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result. *Frick v. Pennsylvania*, 268 U. S. 473. *American Bank & Trust Co. v. Federal Reserve Bank of Atlanta*, 256 U. S. 350, 358. *Badders v. United States*, 240 U. S. 391, 394. *United States v. Reading Co.* 226, U. S. 324, 357. Thus the right to exclude a foreign corporation cannot be used to

prevent it from resorting to a federal court. *Terral v. Burke Construction Co.*, 257 U. S. 529; or to tax it upon property that by established principles the State has no power to tax, *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, and other cases in the same volume and later that have followed it; or to interfere with interstate commerce, *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 203; *Looney v. Crane Co.*, 245 U. S. 178, 188. *Western Union Telegraph Co. v. Foster*, 247 U. S. 105, 114. A State cannot regulate the conduct of a foreign railroad corporation in another jurisdiction, even though the company has tracks and does business in the State making the attempt. *New York, Lake Erie & Western R. R. Co. v. Pennsylvania*, 153 U. S. 628, 646."

See also N. Y. Life Ins. Co. v. Head, 234 U. S. 149; N. Y. Life Ins. Co. v. Dodge, 246 U. S. 357; Matter of Factory Mutual Liability Ins. Co. v. Behan, 233 A. D. 614.

The plaintiffs assert that New York State may not validly regulate an insurance contract entered into outside its borders, although such contract insures New York property. This position is based upon a long line of decisions by the Supreme Court of the United States, starting with Allgeyer v. Louisiana, 165 U. S. 578.

The *Allgeyer* case involved a Louisiana statute which imposed a penalty for every act, done within the state, in aid of, or to effectuate insurance upon property in the state in any marine insurance company which had not complied with the laws of Louisiana. It was attempted to apply this statute to a case where an open marine policy had been executed in New York. Allgeyer, the insured, had sent a notice by mail from Louisiana to the insurer in New York describing a cargo about to be shipped. Such notification was required by the policy to secure coverage. The Court held that the imposition of a penalty for such act was unconstitutional. It was held that the letter of notification did not constitute a contract entered into in Louisiana. It was "but the performance of an act rendered necessary by the provisions of the contract already made between the parties outside the State." Louisiana citizens were protected by the Fourteenth Amendment in their right to

enter into contracts wherever they pleased, as did the New York insurer to enter into contracts in New York covering property in Louisiana. At pages 590-1, the Court states:

"Has not a citizen of a State, under the provisions of the Federal Constitution above mentioned, a right to contract outside of the State for insurance on his property—a right of which state legislation cannot deprive him? We are not alluding to acts done within the State by an insurance company or its agents doing business therein, which are in violation of the state statutes. Such acts come within the principle of the *Hooper case* (*supra*) and would be controlled by it. When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside the State, and as such was a valid and proper contract. The act done within the limits of the State under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the state legislature had no right to prevent, at least with reference to the Federal Constitution. To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the Federal Constitution the defendants had a right to perform. This does not interfere in any way with the acknowledged right of the State to enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the Federal Constitution."

concluding, at page 593, the Court states:

"In such a case as the facts here present the policy of the State in forbidding insurance companies which had not complied with the laws of the State from doing business within its limits cannot be so carried out as to prevent the citizen from writing such a letter of notification as was

written by the plaintiffs in error in the State of Louisiana, when it is written pursuant to a valid contract made outside the State and with reference to a company which is not doing business within its limits."

The principle thus set forth in the Allgeyer case is reiterated in St. Louis Compress Co. v. Arkansas, 260 U. S. 346. Under consideration in that case was a tax imposed by the State of Arkansas, on the gross premiums paid by the insured for the insurance of domestic property in a company not authorized to transact business within the state. In holding such tax invalid, the Court stated: (Holmes, J., page 348)

"The short question is whether this so-called tax is saved because of the name given to it by the statute when it has been decided in *Allgeyer v. Louisiana*, 165 U. S. 578, that the imposition of a round sum, called a fine, for doing the same thing, called an offence, is invalid under the Fourteenth Amendment. It is argued that there is a distinction because the Louisiana statute prohibits (by implication) what this statute permits. But that distinction, apart from some relatively insignificant collateral consequences, is merely in the amount of the detriment imposed upon doing the act. The name given by the State to the imposition is not conclusive. *Child Labor Tax Case*, 259 U. S. 20. *Lipke v. Lederer*, 259 U. S. 557. In Louisiana the detriment was $1000; Here it is five per cent. Upon the premiums—which is three per cent. more than is charged for insuring in authorized companies. Each is a prohibition to the extent of the payment required. The Arkansas tax manifests no less plainly than the Louisiana fine a purpose to discourage insuring in companies that do not pay tribute to the State. This case is stronger than that of *Allgeyer* in that here no act was done within the State, whereas there a letter constituting a step in the contract was posted within the jurisdiction. It is true that the State may regulate the activities of foreign corporations within the State but it cannot regulate or interfere with what they do outside. The other limit upon the State's power due to its having permitted the plaintiff in error to establish itself

as alleged, need not be considered here. *Southern Ry. Co. v. Greene*, 216 U. S. 400, 414; *Cheney Brothers Co. v. Massachusetts*, 246 U. S. 147, 157; *Northwestern Mutual Life Insurance Co. v. Wisconsin*, 247 U. S. 132, 140."

This rule has been applied in many decisions of the Supreme Court. See Aetna Life Insurance Co. v. Dunken, 260 U. S. 389; Minnesota Association v. Benn, 261 U. S. 140. The courts of the state have also had occasion to subscribe to it. People ex rel Kirkman v. Van Amridge, 266 N. Y. 277; U. S. Mortgage and Trust Co. v. Ruggles, 258 N. Y. 32; Stone v. Penn Yan K. P. & B. Railway, 197 N. Y. 279; Hammond v. International Railway Co., 63 Misc. 437, aff'd 134 App. Div. 995.

The doctrine of the *Allgeyer* case, as applied and amplified in subsequent decisions, is that the presence of the insured person or property within the regulating state is an immaterial circumstance. Such situs does not confer upon a state the power to regulate. Such power is conferred exclusively to the state where the contract was made.

Signs that the doctrine is not of invariable applicability are evident, however, in other adjudications of the Supreme Court.

In Equitable Life Assurance Society v. Pennsylvania, 238 U. S. 143, the constitutional issue was the validity of a franchise tax imposed by the State of Pennsylvania upon insurance companies doing business therein. Included in the measure of the tax were premiums collected without the state upon insurance of residents of Pennsylvania. The insurance company was licensed in Pennsylvania. The Court sustained the tax, saying, page 146:

"We are dealing with a corporation that has subjected itself to the jurisdiction of the State; there is no question that the State has a right to tax it and the only doubt is whether it may take this item into account in fixing the figure of the tax. Obviously the limit in that regard is a different matter from the inquiry whether the residence of a policy holder would of itself give jurisdiction over the Company. The argument of the state court is that the Company is protecting its insured in Pennsylvania equally whether

they pay their premiums to the Company's agent in Philadelphia or by mail or in person to another in New York.

These are policies of life insurance and according to the statement of the plaintiff in error are kept alive and renewed to residents of Pennsylvania by payments from year to year. The fact that the State could not prevent the contracts, so far as that may be true, has little bearing upon its right to consider the benefit thus annually extended into Pennsylvania in measuring the value of the privileges that it does grant. We may add that the State profits the Company equally by protecting the lives insured, wherever the premiums are paid. The tax is a tax upon a privilege actually used. The only question concerns the mode of measuring the tax. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 162, 163. As to that a certain latitude must be allowed. It is obvious that many incidents of the contract are likely to be attended to in Pennsylvania, such as payment of dividends when received in cash, sending an adjuster into the State in case of dispute, or making proof of death. See *Connecticut Mut. Life Ins. Co.* v. *Spratley*, 172 U. S. 602, 611; *Pennsylvania Lumbermen's Mut. Fire Ins. Co.* v. *Meyer*, 197 U. S. 407, 415. It is not unnatural to take the policy holders residing in the State as a measure without going into nicer if not impracticable details. Taxation has to be determined by general principles, and it seems to us impossible to say that the rule adopted in Pennsylvania goes beyond what the Constitution allows."

Compania de Tabacos v. Collector, 275 U. S. 87, involved the validity of a taxing act of the Philippine Islands. The tax was imposed upon owners of local property obtaining insurance thereon in companies not authorized to do business in the Philippine Islands, to the extent of a fixed percentage of the premiums paid. Such percentage was higher than that charged when the insurance was placed with a licensed insurer. Two policies were involved. One was negotiated in Barcelona, Spain, with a London Company. Another was negotiated, also in Barcelona, Spain, with a Paris company. The London company was authorized to do business in the Philippine Islands. The Paris company was not. In both cases, however, the policies had been executed,

the premiums paid, and the losses were payable outside the Philippine Islands. The tax was upheld as to the contract secured with the London Company. It was held invalid as to the Paris company policy. As to the latter, the majority of the Court felt themselves bound by the *Allgeyer* and *St. Louis Compress* cases. Distinguishing Equitable Life Assurance Society v. Penn., (supra) the Court said: (page 97)

"The case is not in conflict either with the *Allgeyer* case or with the *Compress* case, decided as late as December, 1922. It turns entirely on the fact that the taxpayer had subjected itself to the jurisdiction of Pennsylvania in doing business there, and it was for the state to say what the condition of its doing that business in the matter of the payment of taxes should be. This Court said that the Equitable Society was doing business in Pennsylvania when it was annually paying dividends in Pennsylvania, or sending an adjuster into the state in case of dispute, or making proof of death, and therefore that it was not improper to measure the tax for doing business in the state by the number of individuals whose lives had been insured and with respect to whom, and the execution of whose contracts, the company was necessarily doing business in the state, even if the premiums paid by some of them had not been paid in the state."

In upholding the tax upon the London company policy, the Court stated; page 98:

"• • • We may properly assume that this tax, placed upon the assured, must ultimately be paid by the insurer, and treating its real incidence as such, the question arises whether making and carrying out the policy does not involve an exercise or use of the right of the London Company to do business in the Philippine Islands under its license, because the policy covers fire risks on property within the Philippine Islands which may require adjustment; and the activities of agents in the Philippine Islands, with respect to settlement of losses arising thereunder. This we think must be answered affirmatively under *Equitable Life Society v. Pennsylvania*, 238 U. S. 143. The case is a close one, but in deference to the conclusion we reached in

the latter case, we affirm the judgment of the court below in respect to the tax upon the premium paid to the London Company."

Most persuasive in opposition to applying the doctrine of the Allgeyer case, to the case at bar is *Osborn v. Ozlin*, 310 U. S. 53, decided April 22, 1940. Involved in that case was the validity of a Virginia statute regulating the insurance of Virginia risks. Insurance companies authorized to do business in that state were forbidden to insure Virginia risks except through regularly constituted and registered agents. Such agents are entitled and shall receive the customary commissions, and may not share more than one-half of such commission with a non-resident broker. The action was brought by foreign corporations authorized to do business in Virginia to restrain the enforcement of the statute. The Supreme Court upheld the law and denied the injunction. Mr. Justice Frankfurter, writing for the majority, stated:

"Virginia has not sought to prohibit the making of contracts outside her borders. She merely claims that her interest in the risks which these contracts are designed to prevent warrants the kind of control she has here imposed. This legislation is not to be judged by abstracting an isolated contract written in New York from the organic whole of the insurance business, the effect of that business on Virginia and Virginia's regulation of it". p. 62

The Court proceeds to say, at pages 65-7

"The present case, therefore, is wholly unlike those instances in which a 'so-called right is used as part of a scheme to accomplish a forbidden result.' *Fidelity & Deposit Co. v. Tafoya*, 270 U. S. 426, 434. *For it is clear that Virginia has a definable interest in the contracts she seeks to regulate* and that what she has done is very different from the imposition of conditions upon appellants' privilege of engaging in local business which would bring within the orbit of state power matters unrelated to any local interests. It is not our province to measure the social advantage to Virginia of regulating the conduct of insurance

companies within her borders insofar as it effects Virginia risks. Government has always had a special relation to insurance. The ways of safeguarding against the untoward manifestations of nature and other vicissitudes of life have long been withdrawn from the benefits and caprices of free competition. The state may fix insurance rates, *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389; it may regulate the compensation of agents, *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U. S. 251; it may curtail drastically the area of free contract, *National Ins. Co. v. Wanberg*, 260 U. S. 71. States have controlled the expenses of insurance companies, New York Insurance Law, Consolidated Laws of New York, c. 28, Sec. 244, and Wisconsin Statutes, Sec. 201.21; and see Report of Joint (Armstrong) Insurance Investigation Committee (N. Y.) pp. 403-18 (1906). They have also promoted insurance through savings banks; see Berman, The Massachusetts System of Savings Bank Life Insurance, Bulletin No. 615, U. S. Bureau of Labor Statistics, and New York Laws of 1938, 3.471. In the light of all these exertions of state power it does not seem possible to doubt that the state could, if it chose, go into the insurance business, just as it can operate warehouses, flour mills, and other business ventures, *Green v. Frazier*, 253 U. S. 233; or might take 'the whole business of banking under its control,' *Noble State bank v. Haskell*, 219 U. S. 104, 113. If the state, as to local risks, could thus preempt the field of insurance for itself, it may stay its intervention short of such a drastic step by insisting that its own residents shall have a share in devising and safeguarding protection against local hazards. *LaTourette v. McMaster*, 248 U. S. 465. All these are questions of policy not for us to judge. For it can never be emphasized too much that one's own opinion as to the wisdom of a law must be wholly excluded when one is doing one's judicial duty. The limit of our inquiry is reached when we conclude that Virginia has exerted its powers as to matters within the bounds of her control.

In reaching this conclusion we have been duly mindful of the cases urged upon us by appellants. In *Allgeyer v. Louisiana*, 165 U. S. 578, apart from the doubts that have

been cast upon the opinion in that case, the state attempted to penalize the making of contracts by its residents outside its borders with companies which had never subjected themselves to local control. Thus the statute was thought to be directed not at the regulation of insurance within the state, but at the making of contracts without. This was followed in *St. Louis Compress Co. v. Arkansas*, 260 U. S. 346; but see the refined distinctions drawn in *Compania de Tabacos v. Collector*, 275 U. S. 87. In *Fidelity & Deposit Co. v. Tafoya, supra*, the Court found that New Mexico had exceeded its power by forbidding 'the payment of any emolument of any nature to any (non-resident) for the obtaining, placing or writing of any policy covering risks in New Mexico. The Court was of the opinion that this statute went 'beyond any legitimate interest of the State. * * *' *ibid.* at 435, but carefully withheld its judgment as to the validity of a later New Mexico statute not unlike the Virginia law here under review."

It is obvious that the majority of the court have departed from restrictive rule of the Allgeyer case. The situs of the insured person or property has become a material factor in the power of a state to regulate or tax. So also has the fact that the corporation challenging the statute is licensed in the state and has thus submitted to regulation.

These factors are both present in the case at bar. The Court concludes that jurisdiction to regulate is not lacking.

This brings under consideration the second ground of attack, addressed to the reasonableness of the regulations. This phase of the inquiry must be approached in the spirit expressed in the *Osborn* case:

"For it can never be emphasized too much that one's own opinion as to the wisdom of a law must be wholly excluded when one is doing one's judicial duty."

The sections requiring the countersigning of policies by a resident agent (130) and the maintenance of an office in this state (422, subsec. 1, and 40 subsec. 4) may be upheld upon the authority of the *Osborn* case and for the reasons there stated. The enforcement of regulations is thus facilitated

and the state is enabled to secure better means of acquiring accurate information for the effectuation of measures which it deems protective of its interests. Of course, if the statute does not apply to any particular transaction, the plaintiffs will be free to resist any attempts by the Superintendent of Insurance to enforce it against them. This action, the Court conceives it, is concerned with the constitutionality of the law. The plaintiffs' contention that these sections will increase the cost of operation is answered by the following quotation from the Osborn case (page 62),

"But the question is not whether what Virginia has done will restrict appellants' freedom of action outside Virginia by subjecting the exercise of such freedom to financial burdens. The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids. *Alaska Packers Assn.* v. *Comm'n*, 294 U. S. 532; *Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412. Compare *Equitable Life Society* v. *Pennsylvania*, 238 U. S. 143. It is equally immaterial that such state action may run counter to the economic wisdom either of Adam Smith or of J. Maynard Keynes, or may be ultimately mischievous even from the point of view of avowed state policy. Our inquiry must be much narrower. It is whether Virginia has taken hold of a matter within her power, or has reached beyond her borders to regulate a subject which was none of her concern because the Constitution has placed control elsewhere. Compare *Wallace* v. *Hines*, 253, U. S. 66, 69."

Next to be attacked is the section (Sec. 168(2)) providing for the use of the standard policy form. This policy was framed by the Board of Fire Underwriters and obviously did not have reference to reciprocal insurance. The law recognizes this in granting certain leeways. Subdivision 2 (e). The Court has compared the policies issued by the plaintiffs (Exhibits 8 and 10) with the standard form prescribed by the statute. There are few differences. The description of the insurer, at the beginning of the policy, is authorized by subdivision 2 (a), which provides for printing

the name of the insurer or insurers. The provision for the insertion of a cash premium is inapplicable to this type of insurance, and the plaintiffs may not be compelled to introduce such false provision. The policy used by the plaintiffs contains a provision that the subscribers are severally, not jointly, liable. The paragraph is, generally, authorized by subsection 2 (e), except that the complete negation of joint liability may run contrary to other provisions of the law establishing surplus and reserve funds, and similar sections to be hereafter discussed. If such sections are valid, this paragraph must be amended so as to add a proviso covering such funds. Where the standard policy refers to "Company's Options" (lines 176-7) the plaintiffs may not be prohibited from changing this to read "Subscribers' Option", so as to correspond to realities. With the exceptions here noted, the Court sees nothing unreasonable or arbitrary in the application to the plaintiffs of Sec. 168.

The plaintiffs attack Sections 410 (1) and 415 (1d), dealing with the powers and mode of selection of the advisory committee. It is stated that "subject to the articles of association and the subscribers' agreement" ultimate power and control shall be in such committee. Since the agreement among the plaintiffs contained in the appointment of agent, or attorney, is in negation of such power, this part of Section 410(1) is rendered meaningless. The statute does not purport to change the subscribers' agreement in this respect. Thus interpreted, there is nothing to support the claim of unconstitutionality. Section 415 (1d) requiring the selection of advisors by vote can not be considered an unreasonable regulation.

Section 412 (1) limits new subscribers to those having assets in excess of liabilities in the sum of $10,000. Renewals are limited to those having such assets or, in lieu thereof, have accumulated the operating reserve provided for in Section 418. This provision denies to the small business man the right to secure this type of insurance. Since the uncontroverted proof shows that there is no necessity for such provision, the Court deems it arbitrary, discriminatory, and repugnant to the "due process" clause.

Section 413 (2) provides for the creation of a contingent or guaranty surplus of at least $250,000 which shall not be

impaired or distributed except upon liquidation. Apparently this surplus is to be held by the Attorney-in-Fact. The creation of such fund is not an unreasonable thing. It is a duty common to all who engage in banking or insurance business. The plaintiffs can not hope successfully to challenge this or any other provision merely by pointing out that it differs from the practice hitherto adhered to by them. The necessity for some change is inherent in all regulation.

Section 415 (1), requiring the acknowledgment of the subscribers' agreement, does not appear arbitrary. That it may be more cumbersome or expensive than the present practice is no indication that it is unconstitutional.

Section 417 (1) provides that every contract shall provide for several liability for assessment. The amount of such liability may be limited by the contract to the amount of the annual "premium" or more accurately, the annual deposit. The Legislature may have deemed this provision essential to the protection of resident subscribers. Neither the nature nor the amount of this liability is such as to support the challenge of invalidity.

Section 418 (1) requires each subscriber to build up an operating reserve, by deducting each year not less than one-quarter of his "earnings as an underwriter", until he has accumulated the greater of these two sums; a) twice the amount of his premium, b) his pro-rata share of an aggregate reserve of one-half per cent of the aggregate amount of insurance in force. Since there is no such thing in the plaintiffs' scheme as "earnings as an underwriter", this provision is incapable of application. Furthermore, in view of the provisions previously noted, this is an arbitrary discrimination against reciprocal insurers. Ordinary companies are not compelled to accumulate a reserve of double the amount of their annual premiums. It is pointed out in the record (page 87) that such requirement would put many stock companies out of business.

Sections 418 (3) and 420 deal with the priorities between various claims against operating reserves and assets, Section 418 (3) must fall with subsection (1). The procedure for payment provided for in Section 420, may, as contended by the plaintiffs partake of the characteristics of joint liabil-

ity. This, of itself, is not sufficient to defeat the section. The provision, viewed on its merits, appears reasonable.

Section 421 deals with bookkeeping procedure. The Attorney-in-Fact is required to keep separate accounts for each subscriber. The provision for crediting each with "premiums earned by him" are incapable of application, since no premiums are earned. The "operating reserve" provision has already been held invalid. The last sentence of the section is also inapplicable. Insofar as the section requires the Attorney-in-Fact to maintain a separate account for each subscriber, it corresponds with the procedure already in use by the plaintiffs, and is a valid provision.

The Court concludes, this lengthy opinion, fully realizing that a fuller exposition of the facts might have cast the law in a different light. Constitutional issues are not readily resolved in vacuo. Provisions which may appear arbitrary on their face often take on a different aspect when the underlying factual situation is fully developed. In the absence of such factual proof, the Court has adhered as closely as practicable to the rule of "presumption of constitutionality," enunciated in *O'Gorman & Young* v. *Hartford Insurance Co.*, 282 U. S. 251.

Judgment will be granted in conformity with this opinion. Papers and exhibits may be obtained at Chambers in Kingston.

Dated, December 10th, 1940.

EXHIBIT "B".

SUPREME COURT OF THE STATE OF NEW YORK,
ALBANY COUNTY.

HOOPESTON CANNING CO., a Corporation; E. PRITCHARD, INC., a Corporation; LANSING B. WARNER, INCORPORATED, a Corporation; HARRY M. BROWN and JAMES T. SMITH, *Plaintiffs,*

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York, *Defendants.*

HOOPESTON CANNING CO., a Corporation; E. PRITCHARD, INC., a Corporation; LANSING B. WARNER, INCORPORATED, a Corporation, PAUL E. EMERSON and BEN A. MORTON, *Plaintiffs,*

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York, *Defendants.*

The above entitled actions, having been consolidated and regularly brought on for trial before me at the County Courthouse in the City of Albany, New York, on the 26th and 27th days of March, 1940, at a Trial Term of the Supreme Court; and the plaintiffs Hoopeston Canning Co., E. Pritchard, Inc., Lansing B. Warner, Incorporated, Harry M. Brown, James T. Smith, Paul E. Emerson and Ben A. Morton, having appeared by Wiswall, Walton, Wood and MacAffer, their attorneys, Zane, Trueblood & Johnson, of counsel; and the defendants Louis H. Pink, as Superintendent of Insurance of the State of New York, and John J. Bennett, Jr., as Attorney-General of the State of New York, having appeared by John J. Bennett, Jr., Vincent Kiebala, of counsel; and the proofs and allegations of the parties appearing, as aforesaid, having been heard and due deliberation having been had; and the Court having duly rendered and filed its decision herein directing

the entry of judgment as hereinafter provided, and made findings of fact and conclusions of law;

Now on Motion of the Court, it is

1. Adjudged and Declared that Section 130 of the Insurance Law of 1939 by its terms applies only to contracts issued, delivered or otherwise effectuated in the State of New York, and therefore has no application to the contracts of inter-insurance mentioned in the evidence, and that the application of said statute to future transactions shall be left open to be determined as such issue may in the future arise; and it is further

2. Adjudged and Declared that Section 168 Subsection 2, of the Insurance Law of 1939, which provides for the use of the standard policy form, permits certain leeways under Subsection 2(e); that the description of Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers at the beginning of each contract of Inter-Insurance used by the plaintiffs is authorized by Subsection 2(a); that said Section 168, Subsection 2, is invalid as against the plaintiffs in the following particulars: the provision for the insertion of a cash premium is inapplicable to plaintiffs' type of inter-insurance, and plaintiffs may not be compelled to introduce such false provision; that the contracts of inter-insurance used by the plaintiffs contain a provision that the Subscribers are severally, not jointly, liable, which paragraph is generally authorized by Subsection 2(e), except that the complete negation of joint liability may run contrary to other provisions of the law establishing surplus and reserve funds, and similar sections hereinafter mentioned; that if such sections are valid, this paragraph must be amended so as to add a proviso covering such funds; that where the standard policy refers to "company's option" (lines 176-7), the plaintiff may not be prohibited from changing this to read "Subscriber's option," so as to correspond to realities. That with the exception herein noted the said statute is valid as against the plaintiffs and not repugnant to the Constitutions of the State of New York or of the United States; and it is further

3. Adjudged and Declared that that part of Section 410, Subsection 1, of the Insurance Law of 1939, which defines the term "Advisory Committee" (the last sentence thereof), is rendered meaningless as applied to plaintiffs' Appointment of Agent and Power of Attorney (Exhibits 5 and 6), and has no application thereto, and that as thus interpreted, the said statute, as against the plaintiffs, is valid and not repugnant to the Constitutions of the State of New York or of the United States; and it is further

4. Adjudged and Declared that Section 412, Subsection (1), of the Insurance Law of 1939, is invalid as against the plaintiffs and repugnant to the Constitution of the State of New York and of the United States; and it is further

5. Adjudged and Declared that that part of Section 413, Subsection 2, of the Insurance Law of 1939, which requires plaintiffs to accumulate and maintain a special contingent surplus or guarantee surplus at the rate of one per cent of the subscriber's alleged net premium income for each year until an amount is accumulated at least equal to the amount of minimum surplus required to be built up, to wit, Two Hundred Fifty Thousand Dollars, without providing for the separate ownership thereof, and provides that the contingent surplus shall not be impaired or paid out by dividend, distributions or by returns of continuing or retiring Subscribers' reserves or deposits, except in the event of liquidation, is valid as against the plaintiffs and not repugnant to the Constitutions of the State of New York or of the United States; and it is further

6. Adjudged and Declared that that part of Section 415, Subsection 1, of the Insurance Law of 1939, which requires Subscribers to execute all Powers of Attorney and Appointments of Agent in a manner sufficient for the acknowledgment of conveyances of real property to be recorded in the state in which the Subscriber is domiciled, is valid as against the plaintiffs and not repugnant to the Constitutions of the State of New York or of the United States; and it is further

7. Adjudged and Declared that that part of Section 415, Subsection 1 (d), of the Insurance Law of 1939, requiring

that the Power of Attorney and Appointment of Agent shall provide for an annual meeting of the Subscribers at which each Subscriber shall have power to vote in person or by proxy for all members of the Advisory Committee to be chosen or appointed at such time, is valid as against the plaintiffs and not repugnant to the Constitutions of the State of New York or of the United States; and it is further

8. Adjudged and Declared that that part of Section 417, Subsection 1, of the Insurance Law of 1939, which requires that every contract of inter-insurance and every Power of Attorney and Appointment of Agent under which contracts of inter-insurance are issued or exchanged shall provide for a contingent, several liability for assessment of the Subscriber as an inter-insurer on the risks of every other Subscriber in an amount of not less than one nor more than ten times the amount of, and in addition to, the alleged annual premium (which the Court holds should more accurately read "annual deposit"), is valid as against the plaintiffs and not repugnant to the Constitutions of the State of New York or of the United States; and it is further

9. Adjudged and Declared that Section 418, Subsection 1, of the Insurance Law of 1939, is invalid and void as against the plaintiffs and repugnant to the Constitutions of the State of New York and of the United States; and it is further

10. Adjudged and Declared that Section 418, Subsection 3, of the Insurance Law of 1939, is invalid and void as against these plaintiffs and repugnant to the Constitutions of the State of New York and of the United States; and it is further

11. Adjudged and Declared that Section 420 of the Insurance Law of 1939 is valid as against the plaintiffs and not repugnant to the Constitutions of the State of New York or of the United States; and it is further

12. Adjudged and Declared that that part of Section 421 of the Insurance Law of 1939, which refers to "premiums earned by him" and "operating reserve," is invalid and void as against the plaintiffs and repugnant to the Constitu-

tions of the State of New York and of the United States; that that part of the said statute which requires the Attorney-in-Fact or Agent to maintain a separate account for each Subscriber is valid as against the plaintiffs and not repugnant to the Constitutions of the State of New York or of the United States; and it is further

13. Adjudged and Declared that that part of Section 422, Subsection 1, of the Insurance Law of 1939, relative to reciprocal insurers maintaining at least one office in the State of New York, and that part of Section 40, Subsection 4, of the said law, relative to the license stating a place of business in the said state, are valid as against the plaintiffs and not repugnant to the Constitutions of the State of New York or of the United States; and it is further

14. Adjudged and Declared that the defendants, their employees, agents and attorneys be perpetually restrained and enjoined from enforcing or attempting to enforce in any manner whatsoever those provisions of the Insurance Law of 1939 of the State of New York herein held to be either invalid or inapplicable as against the plaintiffs and the Subscribers exchanging contracts of inter-insurance under the designations of Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers.

Dated, March 31, 1941.

Enter:

HARRY E. SCHIRICK,
Justice of the Supreme Court.

Dated, April 5, 1941.

W. B. CLARKE,
Clerk.

EXHIBIT "C".

SUPREME COURT OF THE STATE OF NEW YORK, ALBANY COUNTY

HOOPESTON CANNING CO., a Corporation; E. PRITCHARD, INC., a Corporation; LANSING B. WARNER, INCORPORATED, a Corporation; HARRY M. BROWN and JAMES T. SMITH, *Plaintiffs*,

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York, *Defendants*.

HOOPESTON CANNING CO., a Corporation; E. PRITCHARD, INC., a Corporation; LANSING B. WARNER, INCORPORATED, a Corporation; PAUL E. EMERSON and BEN A. MORTON, *Plaintiffs*,

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York, *Defendants*.

Please Take Notice, that Hoopeston Canning Co., a corporation, E. Pritchard, Inc., a corporation, Lansing B. Warner, Incorporated, a corporation, Harry M. Brown, James T. Smith, Paul E. Emerson and Ben A. Morton, the plaintiffs in the above named actions, heretofore consolidated, hereby appeal to the Appellate Division of the Supreme Court, for the Third Department, from those portions of the final judgment of the Supreme Court, entered herein in the office of the Clerk of Albany County on the 5th day of April, 1941, being the paragraphs of said final judgment numbered 5, 6, 7, 8, 11 and 13 which adjudge and decree that the parts of Section 40, Subsection 4, Section 413, Subsection 2, Section 415, Subsections 1 and 1-(d), Section 417, Subsection 1, Section 420 and Section 422, Subsection 1, of the Insurance Law of 1939, of the State of New York (Chapter 882 of the Laws of 1939, being Chapter 28 of the Consolidated Laws), alleged in the com-

plaints in both actions, are valid and constitutional, as against the plaintiffs and applicable to them, upon the law and upon the facts.

Dated this 5th day of April, 1941.

WISWALL, WALTON, WOOD & MACAFFER,
Attorneys for Plaintiffs-Appellants,
Office & P. O. Address,
90 State Street,
Albany, N. Y.

To: John J. Bennett, Jr., Esq., Attorney-General of New York, Attorney for Defendants-Respondents, Albany, New York; W. B. Clarke, Esq., Albany County Clerk.

EXHIBIT "D".

SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT.

248/50.

HOOPESTON CANNING CO., a Corporation; E. PRITCHARD, INC., a Corporation; LANSING B. WARNER, INCORPORATED, a Corporation; HARRY M. BROWN and JAMES T. SMITH, *Plaintiffs-Appellants;* HOOPESTON CANNING CO., a Corporation; E. PRITCHARD, INC., a Corporation; LANSING B. WARNER, INCORPORATED, a Corporation; PAUL E. EMERSON and BEN A. MORTON, *Plaintiffs-Appellants,*

v.

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York, *Defendants-Respondents.*

Argued May Term, 1941. Decided — Term, 1941.

Before Hon. James P. Hill, Presiding Justice; Hon. John C. Crapser, Hon. F. Walter Bliss, Hon. Gilbert V. Schenck, Hon. Sydney F. Foster, Associate Justices.

Appeal by plaintiffs and defendants from a declaratory judgment entered in the office of the Clerk of Albany County on April 5, 1941.

Wiswall, Walton, Wood & MacAffer, Attorneys for Plaintiffs-Appellants, Office and P. O. Address, 90 State Street, Albany, N. Y. Zane, Trueblood & Johnson (Franklin D. Trueblood and Carl O. Olson, of counsel), Associate Attorneys, Office and P. O. Address, 1210 Harris Trust Building, Chicago, Illinois.

John J. Bennett, Jr., Attorney General (Henry Epstein, Solicitor-General, Vincent Kiebala, Assistant Attorney-General, of counsel), Attorney for defendants-respondents, The Capitol, Albany, N. Y.

Opinion for Reversal.

FOSTER, J.:

The plaintiffs in these actions, for themselves and in their representative capacity, challenge the constitutionality and application of certain portions of the Insurance Law of this state sought to be applied to their method of exchanging contracts of inter-insurance. (Insurance Law, Sections 130, 168, 410, 412, 413, 415, 417, 418, 421, 422). The actions were consolidated before trial and the court below has rendered a declaratory judgment in favor of the plaintiffs as to certain parts of the statute, and against them as to other provisions. Plaintiffs and defendants have appealed from those provisions of the judgment which are contrary to their respective contentions. The controlling issues may be stated as follows: (1) Are plaintiffs engaged in doing any insurance business in the State of New York; and (2) if so, do the statutes in question provide a reasonable regulation of such business.

These cases involve two different groups, those engaged in the canning industry, who insure between themselves, and those engaged in the wholesale grocery business and allied lines, who do likewise. Both groups obtain insurance coverage against loss or damage by fire, and similar hazards, by substantially the same methods, although one group operates through what is called the Canners Exchange and the other through the Warner Reciprocal In-

surers. Lansing B. Warner, Inc., an Illinois corporation, acts as attorney in fact for both groups. The persons, firms and corporations insured are referred to as subscribers, and they exchange reciprocal contracts among themselves, as both *insured* and *insurers*, through the medium of the attorney in fact. All of the subscribers are *insurers* of all risks. Prospective subscribers are required to apply for coverage in writing, and to appoint Lansing B. Warner, Inc., as attorney in fact to act for them in the exchange of insurance. The office of this corporation is in the City of Chicago, and it has no office elsewhere. It maintains an underwriting department which employs trained insurance engineers to procure data with respect to prospective risks, and who consult with subscribers as to methods calculated to diminish hazards. The attorney in fact receives applications from prospective subscribers at its office in Chicago, and has the power to accept or reject an applicant, although it may have the advice of the committee in that regard. It issues policies there, and upon the receipt of a policy the subscriber sends to it a sum of money which is called a deposit. The amount of this is determined by the attorney in fact, who takes into consideration the risk, amount and character of insurance, but it usually conforms to the premium charged by a stock insurance company for a similar risk. This deposit is recorded in the separate account of each subscriber, and held to secure any liability arising out of the exchange of contracts. This liability consists of a subscriber's proportionate share of losses and expenses, determined in the case of the Canners group in the ratio that the amount of insurance bears to the total insurance of all subscribers, and in the Warner group in the ratio that the subscriber's deposit bears to the total deposits. The attorney in fact is authorized to adjust, compromise and settle all claims for losses, to give and receive notice, defend suits, and to appoint a statutory agent in any state or territory for the service of process. It receives as compensation for this service twenty per cent of the deposits, out of which it must pay all expenses of operation, except taxes and counsel fees. In the Warner group it receives as additional compensation one-fifth of

the credit balance left after all losses and expenses are paid. A reserve fund is built up by allocating thereto in the case of each subscriber a portion of the unused deposit. The balance of the deposit is returned to the subscriber at the end of each year as a saving. The reserve fund, if not used, is returned to the subscriber after insurance is discontinued.

The power of attorney provides for the appointment of five advisors from among the subscribers, who meet periodically at the office of the attorney in fact, but these advisors do not function as a body and do not have ultimate power in the control and management of the affairs of the subscribers. It also provides that all contracts of insurance are to be made in the office of the attorney in fact at Chicago. The proof indicates that where an applicant is accepted a contract of inter-insurance, which is in the form of a standard fire insurance policy adapted for reciprocal insurance, is delivered to the subscriber by placing it in the mails at the office of the attorney in fact in the City of Chicago. The proof also shows that most of the contracts are delivered to those who have been subscribers for many years, and that the power of attorney from each is executed but once and continued in force until revoked. The cost of reciprocal insurance provided by this method is from thirty to fifty per cent lower than it would be if the subscribers purchased their insurance from standard companies engaged in the business of insurance. Two reasons are given for this economy. The subscribers, as inter-insurers, insure themselves at actual cost without the use of an expensive agency system which is commonly employed by stock companies. Also the loss ratio appears to be far lower than that of the ordinary stock companies, and this is said to be due to the care with which subscribers are accepted.

It is clearly apparent from the foregoing that the agreements or policies issued by the attorney in fact are contracts of insurance (People v. Roschli, 275 N. Y. 26; Thomas Canning Co. v. Canners Exchange Subscribers at Warner Insurance Bureau, 219 Mich. 214). It follows that plaintiffs are engaged in the insurance business. The question

is whether they are engaged in this business in the State of New York.

Both the Canners Exchange and the Warner Reciprocal Insurers applied to the Superintendent of Insurance of the State of New York in 1930 for a license to transact business in this state as inter-insurers, and their licenses have been renewed from time to time. However, the mere issuance of a license raises no presumption that the licensee is doing business within the state, or that the latter has power to regulate (People ex rel. Sea Ins. Co. v. Graves, 274 N. Y. 312).

Aside from exhibits, the evidence at the trial as to this issue was limited to the testimony of a single witness, the vice-president of the attorney in fact. From his testimony these facts appear. New subscribers usually apply through the recommendation of one already insured. An investigator or engineer, who travels out of the Chicago office, calls upon the prospective subscriber and investigates the risk. He does not solicit but he may explain the plan. His opinion is sought by the attorney in fact as to whether or not a prospective subscriber is eligible. The report of the investigator is made to the Chicago office. Data concerning the credit standing of the prospect and moral qualifications is secured from banks and subscribers in this state. The investigator or insurance engineer may give the prospect a blank form of application and power of attorney; at least there is no rule against such a practice. This application and power of attorney, however delivered, may be, and frequently is, executed where the applicant resides and where the risk is located. After a policy is executed the insurance engineers service the risk by advice as to how the same may be minimized. If there is a substantial loss an appraisal of the loss is made at the site of the property, and the loss is then paid on the basis of such appraisal, but at the Chicago office.

Coupled with the acts indicated in this recital, which may and do take place in this state, there is evidence that the transactions involved are not isolated and sporadic, but show a substantial and continuous course of business. Thus the net deposits of the Canners Exchange upon risks

in this state rose from $105,786.86 in the year 1931 to the sum of $298,284.57 in the year 1938; and during the same period the deposits of the Warner Reciprocal Insurers rose from $28,529.88 to $95,162.82. Losses paid by the Canners Exchange for the same period upon such risks exceeded $600,000.00, and for the Warner group the figure was more than $110,000.00.

Do these facts support the conclusion that plaintiffs are engaged in the business of insurance in this state, as contrasted to the mere insurance of risks located within the state. We think the answer must be in the negative. Applications are received, policies are issued and losses are paid in the State of Illinois. There are no resident agents in the State of New York, nor is any representative of the plaintiffs, resident or otherwise, empowered to receive an application, issue a policy, adjust or pay a loss within the confines of this state. Doing business, according to the commonly accepted meaning of the term, must embrace the power to solicit or the power to bind, or both. These elements are lacking in this case, for plaintiffs project no such authority within the limits of this state. The acts of plaintiffs' agents are limited to only an explanation of the plan, not solicitation; an investigation of the risk, and the appraisal of any loss. These acts are wholly consistent with the right of a resident to secure a foreign contract of insurance, a right which is supported by an impressive array of authorities (Allgeyer v. Louisiana, 165 U. S. 578; St. Louis Compress Co. v. Arkansas, 260 U. S. 346; Aetna Life Ins. Co. v. Dunken, 266 U. S. 389; Minnesota Association v. Benn, 261 U. S. 140; People ex rel. Kirkman v. Van Amringe, 266 N. Y. 277; U. S. Mortgage and Trust Co. v. Ruggles, 258 N. Y. 32; Stone v. Pen Yan K. P. & B. Railway, 197 N. Y. 279). If this right may be abridged merely because of the inspection of risks and appraisal of losses here, then it is a right in theory only and of no practical value. The cases cited, however, emphasize the fact that situs does not confer upon the state the power to regulate. The necessary corrollary to this doctrine is that inspections and appraisals, which have to do with the situs, do not confer such jurisdiction. This doctrine of course

does not apply where a foreign corporation has an agent within this state authorized to represent it for the purpose of doing business. It is then doing business here through its alter ego, a situation which does not exist in this case. On the basis of these considerations we reach the conclusion that plaintiffs are not engaged in the business of insurance in this state, and that contracts between them and others, entered into in the State of Illinois, must be governed by the laws of that state (People ex rel, Sea Insurance Co., v. Graves, supra; Huntington v. Sheehan, 206 N. Y. 486; Knights Templars & Masons Life Indemnit, Co. v. Jarman, 187 U. S. 197). It follows, that under the circumstances disclosed, the State of New York has not the power to regulate the business of plaintiffs, and that statutes which attempt to provide for such regulation are invalid and inapplicable as to them. This conclusion renders it unnecessary to discuss any other issue.

The judgment should be reversed with costs and a judgment entered in conformity herewith.

Bliss, J. (dissenting):

I dissent from the opinion for reversal and vote to affirm the judgment below. I do this principally upon the authority of International Harvester Company vs. Ky., 234 U. S. 579. As in that case we have here a continuous course of a large volume of business and business conduct by the appellants over a considerable period of time in the State of New York. We have agents interviewing prospects, explaining the plan, inspecting the property, recommending changes to reduce the risk and even carrying application blanks. These agents obtained the execution of these applications. The payment of the premiums or "deposits" as they are called, is made within the State of New York. The agents of the insurer are within the state, not occasionally but with uninterrupted continuity, soliciting and obtaining contracts, servicing the risks and adjusting the losses. The agents then keep in constant touch with the subscribers and give the usual fire insurance service. Also the usual insurance methods are followed as to losses. They are investigated and adjusted here, although payment

comes from Chicago, and if no satisfactory adjustment is made suit may be brought in New York. The volume of business thus transacted in New York has been large and has down through the years covered something over 50,000 risks. This all indicates a continuous and steady course of business conduct rather than isolated transactions. We must look to the substance of this insurance business and not merely to its outward form. While there has been a well prepared attempt to avoid the semblance of doing business within our state, when the nature of the business itself is analyzed it cannot be distinguished from that of any other foreign fire insurance doing business here.

I therefore vote to affirm the judgment below.

EXHIBIT "E".

At a Term of the Appellate Division of the Supreme Court, Third Department, held at the County Court House in the City of Albany, N. Y., commencing on the 5th day of May, 1941.

Present: Hon. James P. Hill, Presiding Justice; Hon. John C. Crapser, Hon. F. Walter Bliss, Hon. Gilbert V. Schenck, Hon. Sydney F. Foster, Associate Justices.

SUPREME COURT, APPELLATE DIVISION THIRD DEPARTMENT.

HOOPESTON CANNING CO., a Corporation; E. PRITCHARD, INC., a Corporation; LANSING B. WARNER, INCORPORATED, a Corporation; HARRY M. BROWN and JAMES T. SMITH, *Plaintiffs-Appellants,*

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York, *Defendants-Appellants.*

HOOPESTON CANNING CO., a Corporation; E. PRITCHARD, INC., a Corporation; LANSING B. WARNER, INCORPORATED,

a Corporation, PAUL E. EMERSON and BEN A. MORTON, *Plaintiffs-Appellants,*

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York, *Defendants-Appellants.*

The above named plaintiffs-appellants and the above named defendants-appellants in each of the above entitled actions heretofore consolidated having each appealed to the Appellate Division of the Supreme Court, Third Department, from certain portions of the final judgment entered therein in the office of the Clerk of the County of Albany on the 5th day of April, 1941, and the said appeals having been argued by Franklin D. Trueblood of Counsel for the said plaintiffs-appellants, and by Henry Epstein, Solicitor General, of Counsel for the defendants-appellants, and an opinion for reversal of this court having been handed down on the 2nd day of July, 1941 reversing said final judgment on the law and facts on an opinion by Hon. Sydney F. Foster, Associate Justice, in which Hon. James P. Hill, Presiding Justice, Hon. John G. Crapser and Hon. Gilbert V. Schenck, Associate Justices, concurred, with Hon. F. Walter Bliss, Associate Justice, dissenting in an opinion, and directing that judgment be entered in conformity with such decision and opinion and that findings of fact and conclusions of law inconsistent therewith be reversed and disapproved, and that decision and findings may be settled on five days' notice before Mr. Justice Foster at Liberty, New York.

Now on Motion of Wiswall Walton Wood & MacAffer, attorneys for the said plaintiffs-appellants, it is hereby

Ordered that the final judgment entered in these consolidated actions in the office of the Clerk of the County of Albany on the 5th day of April, 1941, be and the same is hereby reversed on the law and facts, and that judgment be and the same is hereby directed to be entered in conformity herewith; and it is further

Ordered that the findings of fact requested by the de-

fendants Nos. 16, 26 and 28 and the first sentence of the findings of fact requested by the defendants No. 27 and the conclusions of law requested by the defendants Nos. 3, 4, 8, 9, 11, 13, 14, 15, 16, 19 and those parts of the conclusion of law requested by the defendants No. 20 found to be valid and applicable, and each and every one of them be and the same are hereby reversed and disapproved.

It is further Ordered that all other findings of fact and conclusions of law found by the Trial Court pursuant to the requests by both plaintiffs and defendants are hereby approved and affirmed; and in addition this Court makes the following Findings of Fact and Conclusions of Law:

Findings of Fact.

1. That the contracts of inter-insurance of the plaintiffs are not performed or made in the State of New York. Inconsistent findings Nos. 22 and 23 at fol. 544 as refused below are reversed and found.

2. That the plaintiffs do not transact any business of insurance within the State of New York.

3. That there are no resident agents in the State of New York of the plaintiffs in each of the above entitled actions, nor is any representative of the plaintiff in each of the above entitled actions, resident or otherwise, empowered to receive an application, issue a policy, adjust or pay a loss within the confines of the State of New York.

4. That the acts of the plaintiffs' engineers are limited to only an explanation of the plan, not solicitation; and investigation of the risk, and the appraisal of any loss.

Conclusions of Law.

1. That the plaintiffs in each of the above entitled actions are not engaged in the business of insurance in the State of New York, and that contracts between them and others, entered into in the State of Illinois, must be governed by the laws of that state;

2. That the State of New York has not the power to regulate the business of the plaintiffs in each of the above en-

titled actions, and that statutes which attempt to provide for such regulation are invalid and inapplicable as to the plaintiffs in each of the above entitled actions.

And it is further Ordered that judgment be entered adjudging and declaring

1. That those portions of the Insurance Law of 1939 of the State of New York alleged in both complaints in the above entitled actions, and each and every part thereof, are invalid, unconstitutional and inapplicable as against the plaintiffs and the Subscribers exchanging contracts of inter-insurance under the designations of Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers.

2. That the defendants, their successors in office, their employees, agents and attorneys be perpetually restrained and enjoined from enforcing, or attempting to enforce in any manner whatsoever those portions of the Insurance Law of 1939 of the State of New York alleged in the said complaints and each of them, against the plaintiffs and the Subscribers exchanging contracts of inter-insurance under the designations of Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers.

Dated at Liberty, N. Y., August 26, 1941.

SYDNEY F. FOSTER,
Justice Supreme Court,
Appellate Division,
3rd Department.

A true copy.
JOHN S. HERRICK, *Clerk.*
Ent. 9/2/41.

EXHIBIT "F".

SUPREME COURT, COUNTY OF ALBANY.

HOOPESTON CANNING CO., a Corporation, E. PRITCHARD, INC., a Corporation, LANSING B. WARNER, INCORPORATED, a Corporation, HARRY M. BROWN and JAMES T. SMITH, *Plaintiffs-Appellants*,

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney General of the State of New York, *Defendants-Appellants*

HOOPESTON CANNING CO., a Corporation, E. PRITCHARD, INC., a Corporation, LANSING B. WARNER, INCORPORATED, a Corporation, PAUL E. EMERSON and BEN A. MORTON, *Plaintiffs-Appellants*,

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney General of the State of New York, *Defendants-Appellants*

The above named plaintiffs-appellants and the above named defendants-appellants in each of the above entitled actions heretofore consolidated having each appealed to the Appellate Division of the Supreme Court, Third Department, from certain portions of the final judgment entered therein in the office of the Clerk of the County of Albany on the 5th day of April, 1941, and the said appeals having duly come on to be heard before the Appellate Division of the Supreme Court, Third Department, at a Term held at the County Court House in the City of Albany commencing on the 5th day of May, 1941, and the said appeals having been argued by Franklin D. Trueblood, of counsel for the said plaintiffs-appellants, and by Henry Epstein, Solicitor General, of counsel for the defendants-appellants, and an order of the said Appellate Division having been made and entered reversing said final judgment on the law and facts and directing that judgment be entered in conformity therewith, and that certain findings of fact and con-

clusions of law be reversed and disapproved, and making certain additional findings of fact and conclusions of law.

Now, on motion of Wiswall, Walton, Wood & MacAffer, attorneys for the said plaintiffs-appellants, it is hereby

Adjudged that the aforesaid final judgment entered in the office of the Clerk of the County of Albany on the 5th day of April, 1941, be, and the same hereby is reversed on the law and facts; and it is further

Adjudged and Declared

1. That those portions of the Insurance Law of 1939 of the State of New York alleged in both complaints in the above entitled actions, and each and every part thereof, are invalid, unconstitutional and inapplicable as against the plaintiffs and the Subscribers exchanging contracts of inter-insurance under the designations of Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers.

2. That the defendants, their successors in office, their employees, agents and attorneys be perpetually restrained and enjoined from enforcing, or attempting to enforce in any manner whatsoever those portions of the Insurance Law of 1939 of the State of New York alleged in the said complaints and each of them, against the plaintiffs and the Subscribers exchanging contracts of inter-insurance under the designations of Canners Exchange Subscribers at Warner Inter-Insurance Bureau and Warner Reciprocal Insurers.

Dated Sept. 2nd, 1941. Enter.

W. B. CLARKE,
Clerk.

EXHIBIT "G".

STATE OF NEW YORK.
SUPREME COURT, COUNTY OF ALBANY.

HOOPESTON CANNING CO., a Corporation, E. PRITCHARD, INC., a Corporation, LANSING B. WARNER, INCORPORATED, a Corporation, HARRY M. BROWN and JAMES T. SMITH, *Plaintiffs-Appellants,*

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney General of the State of New York, *Defendants-Appellants*

HOOPESTON CANNING CO., a Corporation, E. PRITCHARD, INC., a Corporation, LANSING B. WARNER, INCORPORATED, a Corporation, PAUL E. EMERSON and BEN A. MORTON, *Plaintiffs-Appellants,*

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney General of the State of New York, *Defendants-Appellants*

SIRS:

Please Take Notice that the above named Louis H. Pink, as Superintendent of Insurance of the State of New York, and John J. Bennett, Jr., as Attorney General of the State of New York, defendants-appellants in the above named actions, heretofore consolidated, hereby appeal to the Court of Appeals of the State of New York from the final order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the office of the Clerk of said Court on the 2nd day of September, 1941, and a certified copy whereof was entered in the office of the Clerk of the County of Albany on the 2nd day of September, 1941, from the judgment entered thereon in the office of the Clerk of the County of Albany on the same date, which reversed upon the law and facts a final judgment of the Supreme Court, Albany County, entered in the office of the Clerk of Albany County on the 5th day of April, 1941, and from

each and every part of said first mentioned order and judgment.

Dated Albany, New York, September 15, 1941.

Yours, etc.,

JOHN J. BENNETT, JR.,
Attorney General,
Attorney for Defendants-Appellants,
Office and Post Office Address, The Capitol, Albany, New York.

To:

WISWALL, WALTON, WOOD & MACAFFER, ESQS.,
Attorneys for Plaintiffs-Appellants,
Office and Post Office Address, 90 State Street, Albany, New York.

W. B. CLARKE, ESQ.,
Albany County Clerk,
Albany, New York.

EXHIBIT "H".

HOOPESTON CANNING CO., INC., et al., Respondents, v. LOUIS H. PINK, as Superintendent of Insurance of the State of New York, et al., Appellants.

(Decided June 4, 1942.)

Appeal from a judgment entered September 2, 1941, upon an order of the Appellate Division of the Supreme Court in the third judicial department which (1) reversed, on the law and the facts, a declaratory judgment entered upon a decision of the court at a Trial Term (Sch...ick, J.) and (2) directed the entry of judgment, upon additional findings, in conformity with its opinion. (See 262 App. Div. 446.)

John J. Bennett, Jr., Attorney-General (Henry Epstein, Vincent Kiebala and *Milton Kaplan* of counsel), for appellants.

Franklin D. Trueblood and *Carl O. Olson* for respondents.

CONWAY, *J.:*

This is an action seeking a declaratory judgment that certain sections, or portions thereof, of the Insurance Law

(Cons. Laws, ch. 28), as amended in 1939, relating to the regulation of foreign reciprocal insurers authorized to transact the business of insurance within New York State, are illegal and invalid in so far as they purport to affect two licensed foreign reciprocal insurers or inter-insurers. The two groups are known as the Canners Exchange Subscribers at Warner Inter-Insurance Bureau, hereinafter called Canners, and Warner Reciprocal Insurers, hereinafter called Warner.

In 1930 Canners was authorized to transact within this State the business of fire, lightning, hail, windstorm, use and occupancy and sprinkler leakage insurance, pursuant to the then existing provisions of section 305 of the Insurance Law. It has continued to be so authorized to date. There are approximately 976 persons, firms and corporations engaged in the canning industry who are subscribers and approximately ninety-three of them are located in New York State. This action was brought by plaintiffs in a representative capacity on behalf of all the subscribers in Canners. Under the plan each subscriber insures all other insurers and in turn is insured by them. There is an exchange of indemnity among the subscribers evidenced by insurance policies. The exchange of so many policies with the necessity of affixing signatures thereto would be impracticable. Each of the subscribers, therefore, appoints an attorney-in-fact by executing a power of attorney. The attorney-in-fact is Lansing B. Warner, Inc., which has its only office in Chicago, Ill. The appointment authorizes the attorney-in-fact to execute the reciprocal insurance policies, to exchange the contracts of inter-insurance, to receive deposits, to give and receive notices and adjust claims, to bring, defend, compromise or adjust suits at law or in equity and to appoint an agent or representative in any State upon whom process may be served and to perform such other acts as may be necessary. It is a continuing power of attorney and under it subsequent reciprocal insurance contracts are executed. The consideration for the contracts of reciprocal insurance is the exchange of idemnity among subscribers. The obligation of the subscriber is several, separate and individual. To secure his liabilty in the exchange of contracts, the subscriber agrees to deposit with the attorney-in-

fact a sum of money to be designated "Expense and Guarantee Fund," together with a further sum of ten dollars to be designated "Reserve Fund" which may be increased to an average amount of two dollars for each $1,000 of insurance carried by the subscriber. The liability of the subscriber is only such proportionate share of the insurance granted under his policy as the reserve fund deposit of the subscriber bears to the aggregate reserve fund deposits of all subscribers. The power of attorney further provides for the creation of an advisory committee of five members prominent in the canning industry. Their duties are supervisory and they have custody of the funds deposited and are consulted before any new subscriber is admitted. The compensation of the attorney-in-fact is twenty per cent of the expense and guarantee fund due from each subscriber. In return the attorney-in-fact agrees to pay all expenses except certain enumerated ones.

Ordinarily, a canner in this State who wishes to become a subscriber writes to Lansing B. Warner, Inc., at its office in Chicago, Ill., inquiring about the plan. Usually this is done after one of the subscribers in this State has recommended the plan to him. Sometimes the subscriber himself writes, asking the attorney-in-fact to explain the plan to a prospective applicant. Thereupon an inspector or engineer of Canners from Chicago calls upon the prospective applicant at his place of business in New York to explain the plan and its operation and for the purpose of investigating his properties and determining whether in that respect he is eligible to be a subscriber. At the same time the attorney-in-fact also consults with subscribers to determine the standing of the applicant in his community, his reputation for honesty, his "general housekeeping ability and carefulness" and his credit, a report upon which is also obtained from the prospective subscriber's bank. The engineer reports back to the Chicago office and makes a recommendation as to whether an application blank should or should not be sent to the prospective applicant. The attorney-in-fact makes the decision. The application blank when forwarded is accompanied by a power of attorney both of which are to be signed by the prospective applicant and returned by mail

to Chicago, together with a deposit in the amount requested. The amount of the deposit is determined by the attorney-in-fact and is based on the amount of indemnity desired and the physical characteristics and hazards of the subscriber's property. After the acceptance of the application, the engineers of the exchange "service the risk" so as to minimize the risk of loss. A fire insurance policy written on a standard form, approved by the Superintendent of Insurance of this State, is signed by the attorney-in-fact and mailed from Chicago to the Subscriber.

The exchange employs twenty-five or twenty-six trained insurance engineers specializing in fire insurance hazards. They inspect physical properties, investigate the moral hazard of a prospective subscriber and explain the plan of reciprocal insurance to him. These men travel out from Chicago and consult with subscribers as to methods for reducing fire hazards on properties insured, such as by building fire walls, putting in wire glass windows and by other methods familiar to insurance engineers. In the event of a large loss an inspector or engineer is sent from Chicago to examine the property affected and to report back. Upon the basis of his findings the loss is paid from Chicago by the attorney-in-fact. The inspector or engineer has authority to investigate the cause of the fire so that steps may be taken to prevent a similar future loss.

Prior to 1936 no taxes were paid to the State of New York. In 1935, the Insurance Law, section 34, was amended so as to provide for the payment of a premium tax for the privilege of doing business in this State. The Superintendent of Insurance of the State determined that the statute, as amended, was applicable to inter-insurers. A report on premium income so taxable was filed for the year 1935 and taxes for that year were paid under protest. Reports for succeeding years have been filed and taxes paid without protest. The total of the taxes paid by Canners and Warner for the years 1935 to 1938 is $16,026.39.

The annual statements filed with the Superintendent of Insurance of the State by Canners for the years 1931-1938, inclusive, show that, except for the years 1932 and 1933, the gross risks written in this State have increased pro-

gressively from approximately $23,000,000 to $81,000,000; the net risks from approximately $8,000,000 to $32,000,000.

The second group consists of wholesale grocers who are reciprocal insurers under the name of Warner Reciprocal Insurers and they operate under substantially the same plan as do the subscribers of Canners. The principals in this group, however, execute a document known as "Appointment of Agent" instead of a power of attorney. The same corporation which is attorney-in-fact for the subscribers of Canners is agent for the principals of Warner. The appointment of agent provides that the principals shall deposit with the agent at Chicago a sum designated "Guaranty Deposit," the amount of which is to be determined by the agent in accordance with the risk, amount and term of insurance. The liability of the principal is "several, separate and not joint." Provision is made for "Advisors," similar to those on the advisory committee of Canners and for compensation of the agent. The risks are serviced by the underwriting and engineering department of the agent.

The plaintiffs represent approximately 2,100 persons, firms and corporations constituting the principals in Warner of whom approximately 230 are located in this State. The gross risks of Warner in this State were approximately $7,000,000 in 1931 and $38,000,000 in 1938.

Plaintiffs allege that although Insurance Law, section 414, subdivision 2 (Cons. Laws, ch. 28), allows to every authorized foreign reciprocal insurer one year after the effective date of the chapter, January 1, 1940, to revise its subscribers' agreement and its articles of association, if any, so as to conform to the regulations applicable to reciprocal insurers thereafter to be organized under Insurance Law, article 12, that many provisions of the chapter including portions of sections 130, 168, subdivision 2, 410, subdivision 1, 412, subdivision 1, 413, subdivision 2, 415, subdivision 1, 417, subdivision 1, 418, subdivision 3, 420, 421, 422, subdivision 1, and 422, subdivision 2, will become *prima facie* applicable to the two insurers and their subscribers and principals and will "dislocate" their present plan of insurance so as to cause irreparable injury. Therefore, they pray that those sections or subdivisions of sec-

tions be declared invalid, unconstitutional and void as against the plaintiffs and the subscribers and principals of the respective insurers.

Special Term found facts from which it concluded that Canners and Warner were doing business in this State. The Appellate Division reversed three and a portion of a fourth finding of fact. The three findings reversed are the following:

"16. All the subscribers in both groups are associated in the common aim or purpose of receiving and giving indemnity in case of loss. The liability of each Subscriber is to pay his part of the losses and expenses in the ratio that his deposit bears to all the deposits."

"26. The insurance engineers carry blank forms of appointment of agent and power of attorney. These are furnished to prospective subscribers by the insurance engineers upon request. The power of attorney or appointment of agent is fully executed, in the State of New York. It is complete when the prospective subscriber affixes his signature in this state, oftentimes in the presence of the insurance engineer."

"28. In case of loss, particularly a large one, the insurance engineers investigate the cause of the loss and the extent thereof. The investigation with respect of the loss is made in the State of New York."

There was a reversal of the following sentence in finding 27:

"The premiums or deposits are paid with checks drawn on New York State banks."

The weight of the evidence was clearly with Special Term as to findings 16 and 28. As to finding 27, it is unimportant whether the premiums or deposits were paid by checks drawn on New York State banks. As to finding 26, the weight of the evidence as to the findings in the first two sentences is with the Appellate Division but the findings are unimportant. As to the remaining two sentences, they constitute mixed findings of fact and conclusions of law.

In so far as it was found that the power of attorney or appointment of agent was signed in this State by the prospective subscriber and principals, the weight of the evidence is with Special Term.

Taking the unreversed findings of Special Term and those which were reversed but which are supported by the weight of the evidence, the conclusion of law of Special Term numbered 3 that "The plaintiffs are doing the business of insurance in the State of New York" follows of necessity. Each subscriber and each principal is an insurer and initiates within this State his contract of inter-insurance. This is not a situation where the applicant for insurance to be issued to him solely as an *insured* mails an application for that insurance to a foreign company in a foreign State. In this instance the insurer, resident here, signs a power of attorney or appointment of agent within this State and confers thereby power upon the attorney or agent to execute for him a policy of insurance so that he, our resident, may become the insurers reciprocally of hundreds of risks throughout this country and in Canada. Our resident is an insurer and it matters not where his attorney or agent executes the contract of insurance by which he is bound. Thus Insurance Law, section 41, subdivision 3, now provides: "The term 'doing an insurance business,' within the meaning of this chapter, shall be deemed to include (a) the making, as insurer, or *proposing to make as insurer*, of any insurance contract * * *." The two reciprocal insurers are but the aggregations of the subscribers and principals. (Ins. Law, § 410.)

There is another reason why plaintiffs may not have the declaratory judgment they seek

The contention of the plaintiffs in this: That the two insurers have been authorized by the Superintendent of Insurance of the State to transact insurance business here but, despite such authorization, are not transacting any business in this State; that although so *authorized* and *licensed*, since they are not transacting business here, they are not subject to our statutory regulation of *authorized* reciprocals but must be treated as though foreign *unauthorized* reciprocal insurers; that as such foreign recip-

rocal insurers not doing business here, New York State may not regulate their insurance contracts or conduct here because such attempted regulation would run counter to the rule announced in *Allgeyer* v. *Louisiana* (165 U. S. 578) and subsequent authorities holding similarly.

Plaintiffs concede that the two insurers sought authorization to transact business within this State for two reasons: *First*, each subscriber and principal within this State is enabled to serve process upon the Superintendent of Insurance and thus sue the two insurers in our courts upon losses suffered here, and *second*, the licenses enable the insurers to file with and to have audited by the New York Superintendent, annual statements which are available for examination by resident subscribers and principals. In addition subscribers and principals know that the minimum capital and the assets of the insurers, since they have been licensed here, must be substantially the same as those of domestic insurers. (Ins. Law, §§ 42, 90.) These considerations are helpful competitively in obtaining insurance business. That much the two insurers desire. The position they seek to maintain, however, is that since, although authorized, they transact no business here, they may not be held subject to our statutes applicable to authorized reciprocal insurers in other respects but must be treated as though unauthorized.

We must bear in mind in considering the contention of Canners and Warner that the Legislature imposed only the same conditions upon them as foreign insurers as were imposed upon domestic insurers, in so far as obtaining a license to do business within this State is concerned. We make no distinction. Thus Insurance Law, section 414, subdivision 2, reads as follows: "Every such *existing reciprocal insurer* and *every authorized foreign reciprocal insurer*, shall, within one year after the effective date of this chapter, have so revised its subscribers agreement and its articles of association, if any, as to conform to the requirements applicable to reciprocal insurers hereafter to be organized under the provisions of this article." Domestic reciprocal insurers are organized under section 411 of the article. Insurance Law, section 422, is entitled *Foreign or alien reciprocal insurers* and provides for the licens-

ing of a reciprocal insurer of another State or of the Dominion of Canada. The section, subdivision 1, then provides: "* * *. Such foreign or alien reciprocal insurer shall comply with substantially the same requirements of this chapter which are applicable to domestic reciprocal insurers hereafter to be organized and authorized to do the same kind or kinds of insurance business * * *."

Requirements such as these are not attempts to control the operations of foreign insurers outside the State of New York and thus to exercise extraterritorial power. (*Firemen's Ins. Co.* v. *Beha*, 30 Fed. Rep. (2d) 539; affd., 278 U. S. 580.) There the court said (at p. 542):

"The second constitutional ground is that the statute, if it requires, as a condition upon the grant of the plaintiff's license, that it conform its investments in New Jersey to the provisions of the New York law respecting domestic corporations, attempts to control its operations outside New York, and thus to exercise an extraterritorial power. If so, then any other New York statute which subjected foreign insurance companies to the same regulations as domestic in respect of their solvency would be unconstitutional, unless it could be complied with by conduct taking place only in New York, which it seldom could. For example, a state might not prescribe the necessary proportion between the assets and liabilities of a foreign insurance company, or the amount of its cash capital, as a condition to its doing business within its borders. * * *

"Perhaps the power may be limited by the purpose and the fitness of the measure to accomplish it; but, whether that be true or not, when so limited it is not further circumscribed by the indirect effects of its operation. As we have said, scarcely any condition can be imposed touching the financial stability of a foreign corporation, which will not involve some results elsewhere; it is enough that these be ancillary to the accomplishment of genuinely local purposes connected with the company's prospective business. Otherwise each state could set the standard of security for the rest of the Union, an intolerable limitation upon the autonomy of each community."

Let us now consider the sections of which complaint is

made by the plaintiffs. Section 412, subdivision 1, provides that no *authorized* reciprocal insurer shall make any new agreement for insurance with any person, firm or private corporation who or which does not have assets in an amount not less than $10,000 in excess of liabilities. This applies to domestic and foreign reciprocals. Our Legislature has determined that this provision is advisable for the protection of our residents. If Canners or Warner is not *authorized* or *licensed* here, and transacts no insurance business here, the statute is not applicable. Neither insurer need be authorized in this State but if it is, it is clear that it must comply with the statute. Section 415, subdivision 1, provides that every subscriber of an *authorized* reciprocal insurer "shall have executed a subscriber's agreement," and every subscriber shall execute and duly acknowledge the same in a manner sufficient for the acknowledgment of conveyances of real property to be recorded in the State of the subscriber's domicile and that each agreement shall contain certain designated provisions. This applies to domestic and foreign reciprocals. Since the two insurers are licensed, this section is applicable. So it is as to sections 168, subdivision 2, 410, 413, subdivison 2, 417, subdivision 1, 418, subdivisions 1 and 3, 420, 421 and 422, subdivision 2.

As to section 130 a different problem is presented. That section provides, in substance, that "no licensed foreign" insurer shall in this State issue, deliver or otherwise effectuate any contract of insurance covering certain persons, properties or risks "unless such contract of insurance is issued or effectuated through, or countersigned by, a resident licensed insurance agent of this state." Canners and Warner contend that they have never issued, delivered or otherwise effectuated a contract of insurance in this State. If that were so, section 130 would be inapplicable to them. It is, however, applicable because, as indicated above, they are doing business here.

The judgments should be reversed and the complaint dismissed, with costs in all courts.

LEHMAN, *Ch. J.*, LOUGHRAN, FINCHA RIPPEY, LEWIS and DESMOND, *JJ.*, concur.

Judgments reversed, etc.

EXHIBIT "I".

COURT OF APPEALS.

STATE OF NEW YORK, *ss:*

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 4th day of June, in the year of our Lord one thousand nine hundred and forty-two, before the Judges of said Court.

Witness, The Hon. Irving Lehman, Chief Judge, Presiding. John Ludden, Clerk.

REMITTITUR—June 5, 1942.

HOOPESTON CANNING CO., &c., & ORS., *Respondents,*

vs.

LOUIS H. PINK, as Superintendent of Insurance, &c., & ano., *Appellants.*

HOOPESTON CANNING CO., &c., & ORS., *Respondents,*

vs,

SAME, *Appellants.*

BE IT REMEMBERED, That on the 3rd day of November, in the year of our Lord one thousand nine hundred and forty-one, Louis H. Pink, as Superintendent of Insurance, &c., and another, the appellants in this cause, came here unto the Court of Appeals by John J. Bennett, Jr., Attorney-General, and filed in the said Court a Notice of Appeal and return thereto from the order and judgment of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Hoopeston Canning Co., &c., and others, the respondents in said cause, afterwards appeared in said Court of Appeals by Wiswall, Walton, Wood & MacAffer, their attorneys.

Which said Notice of Appeal, and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Henry Epstein of counsel for the

appellants, and by Mr. Franklin D. Trueblood (Chicago, Ill.) of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgments herein be and the same hereby are reversed and the complaint dismissed with costs in all courts.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgments be reversed and the complaint dismissed with costs in all courts, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ JOHN LUDDEN,
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE.

Albany, June 5, 1942.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[Seal State of New York. Court of Appeal.]

/s/ JOHN LUDDEN,
Clerk.

EXHIBIT "J".

At a Special Term of the Supreme Court, Albany County, held in and for the County of Albany, at the Court House, in the City of Albany, State of New York, on the 23rd day of June, 1942.

Present Hon. Riley H. Heath, Justice

HOOPESTON CANNING CO., a Corporation; E. PRITCHARD, INC., a Corporation; LANSING B. WARNER, INCORPORATED, a Corporation; HARRY M. BROWN and JAMES T. SMITH, *Plaintiffs*,

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York, *Defendants*.

HOOPESTON CANNING CO., a Corporation; E. PRITCHARD, INC., a Corporation; LANSING B. WARNER, INCORPORATED, a Corporation; PAUL E. EMERSON and BEN A. MORTON, *Plaintiffs*,

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York, *Defendants*.

The above named defendants having appealed to the Court of Appeals of the State of New York from the judgment of reversal of this Court entered upon the order of the Appellate Division of the Supreme Court, Third Department, in the office of the Clerk of the County of Albany, on the 2nd day of September, 1941, reversing a judgment for defendants heretofore entered herein in the office of the said Clerk on the 5th day of April, 1941, and from each and every part of said judgment of reversal and order of reversal as well as from the whole thereof; and the said appeal having been duly argued at the said Court of Appeals, and after due deliberation the Court of Appeals having order- and adjudged that the said judgment so appealed

from as aforesaid be reversed and the complaint dismissed with costs in all Courts, and having ordered and adjudged that the proceedings therein be remitted to this Supreme Court thereto be proceeded upon according to law;

Now, on reading and filing the remittitur from the said Court of Appeals herein, and upon motion of John J. Bennett, Jr., Attorney-General, Attorney for the defendants herein, it is hereby

Ordered that the order and judgment of the said Court of Appeals be and the same hereby are made the order and judgment of this Court.

Enter.

RILEY H. HEATH,
J. S. C.

EXHIBIT "K".

SUPREME COURT, STATE OF NEW YORK, COUNTY OF ALBANY.

HOOPESTON CANNING CO., a Corporation; E. PRITCHARD, INC., a Corporation; LANSING B. WARNER, INCORPORATED, a Corporation; HARRY M. BROWN and JAMES T. SMITH, *Plaintiffs,*

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York, *Defendants.*

HOOPESTON CANNING CO., a Corporation; E. PRITCHARD, INC., a Corporation; LANSING B. WARNER, INCORPORATED, a Corporation; PAUL E. EMERSON and BEN A. MORTON, *Plaintiffs,*

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York, *Defendants.*

The above named defendants having appealed to the Court of Appeals of the State of New York from the

judgment of reversal of this Court entered upon the ord
of the Appellate Division of the Supreme Court, Thi
Department, in the office of the Clerk of the County
Albany, on the 2nd day of September, 1941, reversing
judgment for defendants heretofore entered herein in t
office of the said Clerk on the 5th day of April, 1941, a
from each and every part of said judgment of reversal a
order of reversal as well as from the whole thereof; a
the said appeal having been duly argued at the said Cou
of Appeals, and after due deliberation the Court of A
peals having ordered and adjudged that the said judgme
so appealed from as aforesaid be reversed and the co
plaint dismissed with costs in all Courts, and having order
and adjudged that the proceedings therein be remitted
this Supreme Court there to be proceeded upon accordi
to law; and the remittitur from the said Court of Appe
having been filed herein, and the order having been enter
herein making the order and judgment of the said Cou
of Appeals the order and judgment of this Court;

Now on motion of John J. Bennett, Jr., Attorney-G
eral, attorney for the defendants herein, it is hereby

Ordered and Adjudged that the order and judgment
said Court of Appeals be and the same hereby are ma
the order and judgment of this Court; and it is further

Ordered and Adjudged that the said judgment enter
herein on the nd day of September, 1941, be and the sa
hereby is reversed and the complaint dismissed; and it
hereby

Ordered and Adjudged that the defendants recover
the plaintiffs the sum of $585.05 costs as taxed, and th
the defendants have execution therefor.

Judgment signed and entered this 23rd day of June, 19

W. B. Clarke, Cle

FILE COPY

SEP 5 1942

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 358

HOOPESTON CANNING CO., A CORPORATION, E. PRITCHARD, INC., A CORPORATION, LANSING B. WARNER, INCORPORATED, A CORPORATION, HARRY M. BROWN AND JAMES T. SMITH,

Appellants,

vs.

LOUIS H. PINK, AS SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AND JOHN J. BENNETT, JR., AS ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Appellees.

HOOPESTON CANNING CO., A CORPORATION, E. PRITCHARD, INC., A CORPORATION, LANSING B. WARNER, INCORPORATED, A CORPORATION, PAUL E. EMERSON AND BEN A. MORTON,

Appellants,

vs.

LOUIS H. PINK, AS SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AND JOHN J. BENNETT, JR., AS ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

FRANKLIN D. TRUEBLOOD,
Counsel for Appellants.

THE DARNELL-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. [redacted]

HOOPESTON CANNING CO., A CORPORATION, E. PRITCHARD, INC., A CORPORATION, LANSING B. WARNER, INCORPORATED, A CORPORATION, HARRY M. BROWN AND JAMES T. SMITH,

Appellants,

vs.

LOUIS H. PINK, AS SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AND JOHN J. BENNETT, JR., AS ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Appellees.

HOOPESTON CANNING CO., A CORPORATION, E. PRITCHARD, INC., A CORPORATION, LANSING B. WARNER, INCORPORATED, A CORPORATION, PAUL E. EMERSON AND BEN A. MORTON,

Appellants,

vs.

LOUIS H. PINK, AS SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AND JOHN J. BENNETT, JR., AS ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

It is not disputed by the appellees that in this cause in the Court of Appeals of the State of New York there was drawn in question the validity of certain statutes of the

said state on the ground of their being repugnant to the Constitution of the United States and that the decision of the said Court of Appeals was in favor of validity. The questions involved being substantial, as the Jurisdictional Statement on file herein shows, this appeal was properly taken under Section 237(a) of the Judicial Code and the Rules of this Court.

Home Insurance Co. v. *Dick*, 281 U. S. 397, 405.
New York Life Insurance Co. v. *Head*, 234 U. S. 149, 159, 160.
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 290.

The appellees contend that since the courts below found certain facts from which the inference of jurisdiction in the New York Legislature to regulate appellants' contracts is said to arise, under the doctrine of *Whitney* v. *California*, 274 U. S. 357, the appellants are precluded from raising the constitutional issues in this Court. But it is axiomatic that conclusions of state courts as to mixed questions of law and fact may never be invoked to deprive suitors of rights guaranteed by the federal constitution.

First National Bank v. *Hartford*, 273 U. S. 548, 552, 553.
Aetna Life Insurance Co. v. *Dunken*, 266 U. S. 389, 394.
Fiske v. *Kansas*, 274 U. S. 380.

This appeal does not present a mere case of construction of a state statute by a state court, as the appellees intimate. The question here is whether the challenged statutes as construed by the Court of Appeals and applied to the facts of this case are repugnant to the federal constitution.

Home Insurance Co. v. *Dick*, 281 U. S. 397, 405-407.
Hanover Insurance Co. v. *Harding*, 272 U. S. 494, 509.
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 290.
Dorchy v. *Kansas*, 272 U. S. 306, 308, 309.

The Trial Court, in holding certain of the challenged statutes violative of the equal protection and due process clauses, awarded the appellants partial relief. Both sides appealed to the Appellate Division of the Supreme Court, Third Department, which Court sustained appellants' appeal to the fullest extent. The Court of Appeals reversed. In its decision the said Court failed to mention a single case in this Court, although the relevant Supreme Court authorities were cited in the briefs. The division of opinion in the courts below amounts to a determination that the questions involved in this appeal are substantial federal questions deserving review.

Louisville & Nashville Railroad Co. v. *Melton*, 218 U. S. 36, 49.

Irving Trust Co. v. *Day*, 314 U. S. 556.

Alton R. Co. v. *Illinois Commerce Commission*, 305 U. S. 548, 550.

Respectfully submitted,

FRANKLIN D. TRUEBLOOD,
Counsel for Appellants.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 358

HOOPESTON CANNING CO., E. PRITCHARD, INC., ET AL.,

Appellants,

vs.

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, ET AL.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR APPELLANTS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 358.

HOOPESTON CANNING CO., A CORPORATION; E. PRITCHARD, INC., A CORPORATION; LANSING B. WARNER, INCORPORATED, A CORPORATION; HARRY M. BROWN AND JAMES T. SMITH, PAUL E. EMERSON AND BEN A. MORTON,

Appellants,

vs.

LOUIS H. PINK, AS SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AND JOHN J. BENNETT, JR., AS ATTORNEY-GENERAL OF THE STATE OF NEW YORK,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR APPELLANTS.

Opinions Below.

The opinion of the Court of Appeals of the State of New York is reported in 288 N. Y. 291, the opinion of the Appellate Division in 262 App. Div. 446, and the opinion of the Trial Term in 24 N. Y. S. (2d) 312.

Jurisdiction.

This appeal is taken pursuant to Section 237(a) of the Judicial Code of the United States as amended (28 U. S. C. A., Sec. 344(a)), and Section 1 of the Act of Congress

of January 31, 1928 (c. 14, 45 Stat. 54), as amended by the Act of Congress of April 26, 1928 (c. 440, 45 Stat. 466), from the final judgment of the Supreme Court of the State of New York, Albany County, entered on June 23, 1942 (R. 204), pursuant to the remittitur of the Court of Appeals of the State of New York (R. 201). The appeal was allowed by a member of this Court on August 6, 1942 (R. 215). Reference is made to the Statement as to Jurisdiction filed pursuant to Rule 12 as amended for a concise statement of the grounds on which the jurisdiction of this Court is invoked. This Court noted probable jurisdiction on October 12, 1942 (R. 325).

Statutes Involved.

The statutes involved are certain portions of Section 130; Section 168, subsection 2; Section 410, subsection 1; Section 412, subsection 1; Section 413, subsection 2; Section 415, subsection 1; Section 415, subsections 1(d) and 1(e); Section 417, subsection 1; Section 418, subsections 1 and 3; Section 420; Section 421, and Section 422, subsection 1, of the Insurance Law of the State of New York. The pertinent portions of these statutes are summarized in the Statement as to Jurisdiction, beginning at page 2, and the statutes are set out in Appendix A. The objectionable portion of Section 40, subsection 4, alleged in the complaints having been exscinded by the legislature after the commencement of these suits need not hereafter be considered. The statutes indirectly involved in this appeal are set out in Appendix B.

Statement of the Case.

1. Parties.

The appellants, plaintiffs below, are representatives of approximately 976 persons, firms, and corporations in the Canners Exchange suit and of approximately 2100 persons, firms, and corporations in the Warner Reciprocal Insurers suit. These are class suits, under Section 195 of the New York Civil Practice Act, where the questions in each suit are of common or general interest to many persons and those who might have been made parties are very numerous and it was impracticable to bring them all before the Court.

Smith v. *Swormstedt*, 57 U. S. 288, 302.

The defendants are the Superintendent of Insurance and the Attorney General of the State of New York.

2. Proceedings Below.

The appellants, being two separate groups of persons, firms, and corporations exchanging in Illinois contracts of indemnity against loss or damage from fire, and their Attorney-in-Fact, brought their separate actions, later consolidated, in the Supreme Court of the State of New York, Albany County, on November 1, 1939, for a declaratory judgment. By these actions the appellants challenge the validity and applicability to these groups of certain portions of the New York Insurance Law under the Fourteenth Amendment to the Constitution of the United States. Consolidation of the causes was ordered (R. 154). A trial to the Court resulted in a judgment (R. 149) declaring that the State of New York had jurisdiction to regulate appellants' contracts of indemnity, but that certain of the challenged statutes were invalid under the equal protection of the laws clause and the due process clause on the ground

of unreasonable regulation, while certain other of the statutes were applicable and valid. Section 130, the countersignature statute, the Trial Term held to be inapplicable on its face (R. 149). Both sides appealed to the Appellate Division for the Third Department, which Court reversed the Trial Term on the issue of jurisdiction and ordered judgment in favor of appellants (R. 183). The appellees thereupon appealed to the Court of Appeals, which Court reversed the judgment of the Appellate Division and ordered the complaints dismissed (R. 202). A judgment was duly entered in the Supreme Court of New York, Albany County, on June 23, 1942, giving effect to the remittitur of the Court of Appeals, and this appeal is from that judgment (R. 205). A detailed statement of the proceedings below is contained in the Statement as to Jurisdiction on file herein.

3. Statement of Facts.

a. *General Statement.*

The appellants comprise two groups of carefully selected persons, firms, and corporations, known as Subscribers (R. 47), who cooperate in carrying their own fire insurance at actual cost (R. 48). One of these groups is confined to Subscribers engaged in the canning industry, while the other group is limited to Subscribers engaged in the wholesale grocery business and allied lines (R. 46, 51). Insurance is effected by exchanging under the Illinois law (R. 120) contracts of indemnity of a private nature, in which each Subscriber assumes an individual and several liability for his proportionate part of any loss (R. 48). Each Subscriber deposits funds, out of which his liability is paid, and these funds remain his separate property until used or returned. The Subscribers in the canners group have on hand aggregate deposits exceeding four million dollars (R. 46); the Subscribers in the wholesale grocery group

have on hand aggregate deposits of approximately one and one-half million dollars (R. 46). Approximately ten per cent of the Subscribers reside in the State of New York (R. 51), and both groups are licensed in that state (Exhibits 16, 17; R. 71, 280, 281).

b. *History of Groups.*

The original group of canners began carrying their own fire insurance in 1907 (R. 47). Within a short time thereafter this group had expanded to include a majority of the canners throughout the United States and Canada (R. 49, 50). The field from which to select canners eligible for this insurance having always been limited, the number of Subscribers to the plan has not changed materially from year to year (R. 51). Although the list has undergone some change, substantially the same canners who started in 1907 are still with Canners Exchange. The number of Subscribers has continued at all times between nine hundred and a thousand, between ninety and a hundred of whom are in the State of New York (R. 51). In addition to the appellant Subscribers, California Packing Corporation, H. J. Heinz Co., Minnesota Valley Canning Co., without, and Snider Packing Corporation of Rochester, Empire State Pickling Co. of Phelps, Comstock Canning Corporation of Newark, and Curtice Brothers of Rochester, within, the State of New York, have been for many years representative Subscribers (R. 49, 50, 51, 56).

Canners Exchange having proven successful, attention was given to forming a similar cooperative for those engaged in the wholesale grocery business and allied lines. In 1912, therefore, a group of wholesale grocers began carrying their own fire insurance under a plan substantially similar to that employed by the canners (R. 46, 47, 48). The number embracing the plan also increased rapidly at the beginning, although it has remained approxi-

mately twenty-one hundred for a considerable time. Two hundred and thirty of this group are in the State of New York (R. 46, 51). The name of Wholesale Grocery Subscribers, originally used to designate these Subscribers, was in 1926 changed to Warner Reciprocal Insurers, under which designation substantially the same group has continued ever since (R. 46, 51). In addition to the appellant Subscribers, California Packing Corporation, H. J. Heinz Co., H. Kellogg & Sons, Hubbard Grocery Co., without, and Snider Packing Corporation of Rochester, Pepsi-Cola Company of Brooklyn, Seaman Brothers of New York City, and R. C. Williams & Co., within, the State of New York, are representative Subscribers (R. 49, 50, 51).

c. *How the Plans Operate.*

The canner or wholesale grocer who desires to participate in one of these cooperative enterprises obtains an application blank (Exhibits 3, 4; R. 57, 220, 221) and Power of Attorney (Exhibits 5, 6; R. 57, 222, 225) from the office of the Attorney-in-Fact in Chicago. The applicant signs and returns both documents by mail to the office (R. 95). In the event the applicant is accepted, the Attorney-in-Fact executes a contract of inter-insurance, the standard fire insurance policy adapted to this use (Exhibits 7, 8, 9, 10; R. 59, 228, 232, 235, 239), which it delivers to the applicant by placing it in the mail at its office in Chicago (R. 60). An estimate of the amount of the initial deposit is usually enclosed, and this sum the Subscriber forwards by mail. Subsequent deposits are made and held in the same manner as original deposits (R. 60). Virtually all of the contracts of inter-insurance are exchanged by canners and wholesale grocers who are old Subscribers (R. 55). The Power of Attorney is executed but once; thereafter it continues in force until revoked. Once it is executed it forms the basis for the

exchange of all subsequent contracts with the particular Subscriber (R. 112). There is no premium or price charged for this indemnity; the consideration for each contract is the exchange of promises; and the ultimate cost cannot be determined until the end of the particular period covered (R. 62).

Trained insurance engineers employed on a salary basis make such inspection trips out of Chicago as may be necessary. Their principal duty is to inspect outstanding risks, to the end that hazards from fire be diminished (R. 54, 55). They may sometimes explain the plan to a prospective Subscriber, but they have no authority to solicit or negotiate an application or to bind the appellants in any way, as no such power is projected beyond the office of the Attorney-in-Fact (R. 55, 67). They receive no commissions. Although it is possible for an engineer to furnish a blank Power of Attorney to a prospective Subscriber, an officer of the Attorney-in-Fact testified that he knew of no instance where this had ever been done (R. 100, 101).

All matters pertaining to losses, as well as all other affairs between the Attorney-in-Fact and the Subscriber, are transacted by mail (R. 66). This is made possible because of the high degree of trust existing between the Subscriber and Attorney-in-Fact. All adjustments are stated at the office of the Attorney-in-Fact in Chicago (R. 67). In the event of a "very unusual" loss, an inspector, having no authority to make an adjustment, may be sent from Chicago to examine the property. However, the overwhelming number of losses are small ones that are paid as a routine matter without investigation (R. 111). The invariable rule is that all losses are paid by check sent through the mails from the office of the Attorney-in-Fact to the Subscriber sustaining the loss (R. 66). In thirty-five years no suit has ever been brought on a loss in New York State; indeed, no serious controversy has ever arisen between a Subscriber and the Attorney-in-Fact respecting

such loss (R. 112). All performance under the contract of inter-insurance and the Power of Attorney, as the Appellate Division found, takes place in Illinois (R. 182).

d. *Financial Standing of Groups.*

The financial standing, the fairness and equity observed throughout the years in the payment of losses, the integrity, efficiency and economical management of these groups are not open to question. The Trial Court found that both groups "have built up the highest reputation for financial soundness, fair dealing, and the prompt payment of claims" (R. 123). As early as 1916 the founder reported to the National Canners Association (Exhibit 21; R. 73, 314C) that "there is absolutely no question • • • (that) any honest loss sustained by Canners Exchange Subscribers will be paid. We have more actual assets back of our policy than any stock company doing business, and our cash assets, available for losses, are very much larger in proportion to the amount involved than are the cash assets available for losses of any stock company." In 1937 the report of examination of the affairs of the canners group conducted under the convention of insurance commissioners of the several states (Exhibit 19; R. 72, 300) reported that "The cash position of the Exchange is excellent and all investments are of a high grade," that "The Exchange is efficiently managed as is evident by its sound financial condition," and that "Subscribers are afforded good treatment and contractual obligations are fairly discharged." This same convention in reporting on its examination of the affairs of the wholesale grocers group in 1937 found that (Exhibit 18; R. 72, 284) "The Exchange is in sound financial condition with an excellent cash position. Its assets are of a high grade and can readily be turned into cash to meet any emergency which may arise," that "all contractual obligations are taken care of promptly and in accordance with the provisions

of the agreements," and that the affairs of the exchange are managed "in an economical and efficient manner."

At the end of 1938 the aggregate deposits of the canners group exceeded four million dollars, those of the wholesale grocery group, nearly one and a half milion. The great bulk of these assets consist of United States government securities and the rest of cash in banks (Exhibits 14, 15; R. 71, 265, 275).

e. *Economy of Cooperatives.*

The courts below have found the cost of this cooperative indemnity to be from thirty to fifty per cent lower than comparable insurance would cost if the Subscribers purchased it from companies engaged in the business of insurance (R. 156, 188). In general there are two reasons for this economy: (1) The Subscribers insure themselves at actual cost without using the expensive agency system employed by stock companies,[1] the elimination of which, statistics show, effects a saving of at least twenty-five per cent of the cost of this insurance[2] (R. 75); (2) The loss ratio is far lower than those of the stock companies. Without the agency system there is no indiscriminate acceptance of risks by a resident agent whose principal thought is to earn a commission. There is no conflagration hazard, risks being scattered (Exhibit 21; R. 75, 76, 156).

The founder of these exchanges, Mr. Lansing B. Warner, reported to the National Canners Association in 1916 (Ex-

1. In *Matter of Northwestern National Insurance Company* v. *Pink*, 288 N. Y. 359 (1942), it was stated in a dissenting opinion concurred in by Conway, J. that "The payment of commissions constitutes a substantial percentage of acquisition costs, which in turn determine premium rates."

2. The agency expense for all stock companies for the year 1941 averaged 26.2 per cent of the cost of the insurance. *Best's Insurance News (Fire and Casualty Edition)*, Vol. 43, No. 7, p. 16, November, 1942.
Compare the economy made possible in savings-bank life insurance by the elimination of the agency system. See *Study of Legal Reserve Life Insurance Companies*, T. N. E. C. Monograph No. 28 (1941) p. 310, where it is stated that, "The principal reasons for the low cost of savings-bank life insurance is, of course, that the savings banks do not incur agency expenses."

hibit 21; R. 73, 314C) that "Our record, so far as savings are concerned, speaks for itself. In eight years actual cash savings, as compared with the cost of the same amount of insurance if placed with stock companies, have amounted to more than $600,000, and, in addition to this, we have been instrumental in having the average rates on canning factories throughout the United States reduced twenty per cent, and the $600,000 saving above referred to is in addition to this twenty per cent rate reduction. This twenty per cent reduction, we estimate, means nearly $400,000 saving to the industry per annum"; that the plan "is an object lesson in cooperation * * * with losses paid of nearly one million dollars and with savings direct and indirect amounting to from one to two million dollars and with the improved insurance conditions now existing as compared with eight years ago."

For the year 1938 alone the members of the canners group saved an aggregate of $922,000 over the amount their insurance would have cost if obtained from stock companies, while the comparable saving for the Wholesale Grocery group was $286,000 (Exhibits 15, 14; R. 71, 256, 248).

f. *Comparative Insurance Costs.*

Exhibit 26 (R. 74, 318) is an analysis of income and disbursements of five of the outstanding fire insurance companies compared with the Canners groups for the year 1938 (R. 74). These companies—Aetna Insurance Co., The Home Insurance Co., Great American Insurance Co., Hartford Fire Insurance Co., and Insurance Company of North America—showed an average loss expense of 44.2 per cent for 1938 as against a 23.5 per cent loss expense for Canners Exchange. The five companies also showed an average operating expense for the same year of 47.9 per cent compared with total operating expenses (including compensation to the Attorney-in-Fact and taxes) of

28.4 per cent for the cooperative. As against an average dividend paid to the stockholders of the five companies of 7.9 per cent the savings returned to Subscribers amounted to 48.1 per cent.

Likewise Exhibit 25 (R. 74, 317) is a comparison of figures for the wholesale grocery group with those for the same five stock companies for 1938 (R. 74). Against an average loss expense for the stock companies of 44.2 per cent the wholesale grocery group showed a loss expense of 16.9 per cent; against the average operating expense of the stock companies of 47.9 per cent the total expenses (including compensation to the Attorney-in-Fact and taxes) of Warner Reciprocal Insurers was 27.2 per cent; and as against an average dividend of the stock companies paid to stockholders of 7.9 per cent the savings to the members of the cooperative amount to 55.9 per cent. The official records for subsequent years were not available at the time of the trial.

g. *Licenses of Groups.*

Each group is licensed (Exhibits 1, 2; R. 53, 218, 219) to exchange contracts of inter-insurance in Illinois by the Director of Insurance of that state. Although all contracts are exchanged in Illinois and none are, or ever have been, exchanged in New York, each group has been licensed (Exhibits 16, 17; R. 71, 280, 281) by the Superintendent of Insurance of that state since 1930. Taxes have been paid regularly to New York since the enactment of the taxing statute in 1936 (Exhibit 22; R. 73, 315). The Superintendent is appointed agent for the service of process.

h. *Effect of New York Statutes.*

As these plans have been worked out over a period of many years they present to the Court a delicately balanced system of self-insurance of unprecedented efficiency. The evidence is undisputed that the application of the challenged statutes to them would throw the plan upon which they operate out of balance, create inequities among Subscribers, increase the cost materially, deny to a great number the right to participate, and lead to the ultimate destruction of both cooperatives (R. 77-83). The effect of the enforcement of each particular statute upon these groups is considered in detail under Points II and III, beginning at page 38 of this brief.

Specification of Errors.

The Court of Appeals of the State of New York erred in the following respects, to-wit (R. 211):

1. In reversing the final order of the Appellate Division, Third Department, entered on September 2, 1941, and in ordering the complaints dismissed.

2. In refusing to hold that the statutes alleged in the complaints, and each of them, are invalid as being in violation of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States because they purport to regulate, interfere with, and prohibit appellants' contracts of inter-insurance made and to be performed outside the State of New York, and thereby deprive appellants of their liberty and property without due process of law (R. 211, 212, 213).

3. In refusing to hold the aforesaid statutes, and each of them, invalid as being in violation of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States because they purport to impose regulations upon appellants' contracts of inter-insurance that are

unreasonable, arbitrary, and capricious without any reasonable relation to the end sought to be attained, and thereby deprive appellants of their liberty and property without due process of law (R. 213).

4. In refusing to hold that Sections 412, subsection 1, 417, subsection 1, and 415, subsection 1, of the aforesaid statutes violate Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States because they purport to impose regulations and prohibitions upon appellants' contracts of inter-insurance that are discriminatory against appellants, and thereby deprive them of the equal protection of the laws (R. 213, 214).

5. In refusing to hold that the State of New York may not attach a condition to appellants retaining their New York licenses by requiring them to submit to the purported regulations and prohibitions of the statutes alleged in the complaints, and each of them, which statutes violate Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States in the manner set out in paragraphs 2, 3, and 4 hereof (R. 214).

Summary of Argument.

Point I. The statutes are invalid and inapplicable on the ground of jurisdiction under the due process clause. Appellants' contracts are personal contracts of indemnity made and to be performed in the State of Illinois. The mere fact that payment of indemnity in Illinois is dependent upon the condition of loss or damage to property in New York, or that the owner of the insured property resides in New York, does not affect the Illinois jurisdiction to regulate these contracts. Appellants' contracts of inter-insurance, being inter-related, must all be construed in accordance with the Illinois law regardless of the location of the property or the residence of the Subscriber. The application of diverse state laws to appellants' contracts would throw the entire system out of balance and lead to the ultimate destruction of the plan.

Point II. Certain sections of the New York Insurance Law, notably Section 412, subsection 1, which denies to citizens who do not have a net worth in excess of ten thousand dollars the right to participate in this indemnity, are invalid and inapplicable under the equal protection of the laws clause.

Point III. The statutes are invalid and inapplicable on the ground of unreasonable regulation.

ARGUMENT.

POINT I.

Jurisdiction.

Under the due process clause the State of New York is prohibited from exercising jurisdiction over appellants' contracts of inter-insurance.

All of appellants' contracts of inter-insurance (Exhibits 7, 8, 9, 10[1]; R. 59, 228, 232, 235, 239) are and always have been made in Illinois. No contracts have ever been made in New York (R. 60, 163).

The Appellate Division, in approving the finding of the Trial Court (R. 163) that the contracts are "as a matter of law, Illinois contracts of insurance," said (R. 189, 190):

> "Applications are received, policies are issued and losses are paid in the State of Illinois. • • • Contracts between them (appellants) and others, entered into in the State of Illinois, must be governed by the laws of that state."

These findings were not impugned by the Court of Appeals (R. 196, 197).

The contracts, being made in Illinois, are governed by Illinois law, not by New York law. Being valid in Illinois the contracts are valid in all other states, including New York. Due process requires the application of Illinois law to them.

Aetna Life Ins. Co. v. *Dunken*, 266 U. S. 389, 399.
Home Ins. Co. v. *Dick*, 281 U. S. 397, 407, 408 (opinion by Brandeis, J.).

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1. Exhibits 7 and 9 are the so-called old New York standard contracts adapted for use by Warner Reciprocal Insurers and Canners Exchange Subscribers respectively, while Exhibits 8 and 10 are the so-called new New York standard contracts adapted for use by these groups. The two types of contracts contain substantially the same provisions.

Hartford Indemnity Co. v. *Delta & Pine Land Co.*, 292 U. S. 143, 149.

St. Louis Cotton Compress Co. v. *Arkansas*, 260 U. S. 346, 347 (opinion by Holmes, J.).

Minnesota Commercial Men's Ass'n v. *Benn*, 261 U. S. 140, 145.

Allgeyer v. *Louisiana*, 165 U. S. 578, 591.

Mutual Life Ins. Co. v. *Cohen*, 179 U. S. 262, 269.

Knights Templars' Indemnity Co. v. *Jarman*, 187 U. S. 197, 204.

Liverpool Steam Co. v. *Phenix Ins. Co.*, 129 U. S. 397, 453.

Marine Ins. Co. v. *St. Louis, etc., Ry. Co.*, 41 Fed. 643, 653.

It is necessary that all of appellants' contracts, regardless of the location of the property or the residence of the Subscriber, be governed by Illinois law (R. 77). The Attorney-in-Fact executes every contract on behalf of all of the Subscribers (Exhibits 5, 6; R. 58, 223, 226); therefore every Subscriber is a party to every contract. A network of inter-related contracts is thereby created among the Subscribers who are scattered throughout the United States, Canada, and elsewhere. Every Subscriber, regardless of residence or location of the property, pays the same proportional part of every loss (R. 47, 48), and it obviously would be unfair if the rights, for example, of a New York Subscriber, were determined by more favorable laws than those determining the rights of a Subscriber in another jurisdiction, or vice versa. If the laws of the various jurisdictions were to be applied to these contracts, inequalities and inequities among the several Subscribers would be inevitable (R. 77). If New York is to be given the right to regulate appellants' contracts, other states, paradoxically, have the same right. The door would thus be opened to all manner of conflicting regulations. It is the unchallenged opinion of one of appellants' officers that the

subjection of appellants' contracts to the varying laws of the different jurisdictions would result in the ultimate destruction of this system of insurance, and appellees have not suggested any reason for exposing these groups to this danger (R. 77).

The rule which requires appellants' contracts to be uniformly interpreted under a single standard is stated in *Royal Arcanum* v. *Green*, 237 U. S. 531, 542, approved in *Modern Woodman* v. *Mixer*, 267 U. S. 544, 551, in an opinion by Holmes, J.

Illustrating the rule further is *Taggart* v. *Wachter, etc., Inc.*, 179 Md. 608, 618, 619, where the Maryland Court of Appeals applied a uniform standard of law to a quasi-reciprocal exchange. The Court said:

> "The same result (the application of the law of Pennsylvania, in which state the contracts were exchanged) would seem to follow from the requirement arising from the reciprocal, cooperative nature of the enterprise, that all policy holders be affected alike. *Royal Arcanum* v. *Brashears*, 89 Md. 624, 631, 43 A. 866. This, which could be assured only by the application of the laws of one jurisdiction would be an implied undertaking of subscribers, for they intended dealing and being dealt with on one uniform basis, and all that affects the subscribers as a whole must be determined upon and ordered by one authority to accomplish that. 'Indeed, the accuracy of this conclusion is irresistibly manifested by considering the intrinsic relation between each and all the members concerning their duty to pay assessments and the resulting indivisible unity between them in the fund from which their rights were to be enjoyed. The contradiction in terms is apparent which would rise from holding, on the one hand, that there was a collective and unified standard of duty and obligation on the part of the members themselves and the corporation, and saying, on the other hand, that the duty of members was to be tested isolatedly and individually by resorting not to

one source of authority applicable to all, but applying many divergent, variable, and conflicting criteria." *Supreme Council of Royal Arcanum* v. *Green*, 237 U. S. 531, 541, 35 S. Ct. 724, 727, 59 L. ed. 1089, L. R. A. 1916A, 771; *Wardle* v. *Townsend*, 75 Mich. 385, 42 N. W. 950, 4 L. R. A. 511."

We submit that the payment of losses "affects the Subscribers as a whole" and therefore "must be determined upon and ordered by one authority." Nor can there be any question that the Subscribers "intended dealing and being dealt with on one uniform basis."

The doctrine of the preceding cases was applied to group insurance by this Court in *Boseman* v. *Conn. Gen. Life Ins. Co.*, 301 U. S. 196, 206, the language being:

> "The conclusion that Pennsylvania law governs the policy provision requiring notice of claim is supported not only by the making and delivery of the contract of insurance in that State, the declaration in the policy that Pennsylvania law shall govern and petitioner's acceptance of the insurance according to the terms of the policy but also by the purpose of the parties to the contract that everywhere it shall have the same meaning and give the same protection and that inequalities and confusion liable to result from applications of diverse state laws shall be avoided."

It is apparent that appellants' contracts (Exhibits 7, 8, 9, 10; R. 59, 228, 232, 235, 239) differ from those of corporate insurers. As to the latter, only the insurer and insured are parties, and no other person is directly interested in them. A particular contract is not inter-related with all of the remaining contracts. The corporate insurer's contract is usually countersigned and delivered by a resident agent in the jurisdiction where the insured resides or the property is situated, and is therefore subject to local law. Usually all activities under such contracts take place within the local jurisdiction, including the adjustment of losses. It is thus apparent that ordinarily

no necessity exists for interpreting such contracts according to a single uniform standard of law.

The State of New York has expressly recognized the necessity for applying a uniform standard to all Subscribers by providing in Section 415, subsection 1 (Appendix A), of the Insurance Law that "every Subscriber's agreement (Power of Attorney) shall be identical in terms * * * with all other Subscriber's agreements currently in force." If the requirement of this section is to be met, it follows that were New York to be allowed to regulate any of appellants' contracts, the state must be allowed to regulate all of them, including the contracts upon risks in other states.

In addition to the foregoing, all performance under appellants' contracts of inter-insurance takes place in Illinois (R. 122), and the Appellate Division expressly found (R. 182) that the said contracts are not performed in the State of New York, the finding having been acquiesced in by the Court of Appeals (R. 196, 197).

Western v. Genesee Mutual Ins. Co., 12 N. Y. 258, 262.

Clay Fire Ins. Co. v. *Huron Salt Co.*, 31 Mich. 345, 354.

Connecticut Fire Ins. Co. v. *Way*, 62 N. H. 622, 623.

It is immaterial that the standard forms of policies adapted for use by appellants (Exhibits 7, 8, 9, 10; R. 59, 231, 233, 238, 240) grant the theoretical right to require a Subscriber to furnish a certificate of a notary or plans of a destroyed building, or to submit to an examination under oath in respect to a loss. In the entire history of appellants' groups these requirements have never been invoked (R. 110). But even if the Subscribers were required to comply with these provisions, which they are not, there would still be no performance in New York state.

(1) The Illinois jurisdiction over appellants' contracts is not affected by acts in the State of New York.

The appellants employ approximately twenty-six trained insurance engineers, who contribute largely to the success of this inter-insurance (R. 54). From complete records, charts and plans of the insured properties kept in its office the Attorney-in-Fact obtains up-to-the-minute information regarding all risks. If a faulty or dangerous condition develops in one of these it can usually be corrected by letter or telephone. However, when the necessity arises, an engineer will go from the office to view the property and counsel with the owner regarding the minimizing of the hazard from fire. He may also explain the plan of self-insurance to the infrequent prospective Subscriber (R. 54, 55, 92, 188, 189). In visiting a risk the engineer ascertains the moral hazard by observing the "housekeeping" of the Subscriber. For example, if the risk is near a railroad the engineer learns whether the weeds and grass around the plant have been cut so as to avoid the hazard from locomotive sparks (R. 98), or he may recommend that fire walls or wire glass windows be installed (R. 54). Inspections of new properties are necessarily infrequent. The engineers have no authority to solicit new Subscribers, or to bind appellants in any way (R. 189). Nor does the engineer make inquiries in the field regarding the credit standing or reputation of an applicant (R. 98). The engineers receive no commissions, being employed on a salary basis.

Because stocks of canned goods and groceries as they accumulate are ordinarily stored in buildings and warehouses, the plans and specifications of which are on file in the office of the Attorney-in-Fact, there is usually no necessity for inspecting such goods before coverage.

As to losses, the overwhelming majority are small ones that are paid without inspection upon proof of loss sent

in by the Subscriber (R 111). However, in the event of a "very unusual" loss, an inspector who has no authority to bind appellants or make an adjustment is sent out from Chicago to view the property to determine the extent as well as the cause of the loss in order that future losses from the same cause may be avoided (R. 111). Since only one-tenth of the total number of Subscribers reside in New York State (R. 46, 51), the relative number of losses in that state requiring inspections is very small. Losses are never adjusted in New York State; all adjustments are stated at the office of the Attorney-in-Fact in Chicago and are paid by check mailed to the Subscriber from that place (R. 66, 67). It is plain that there is no adjustment of losses in the sense that stock companies adjust them.

We assert that the Appellate Division correctly stated the law applicable to the activities of appellants' engineers (R. 189, 190). It said:

> "These acts are wholly consistent with the right of a resident to secure a foreign contract of insurance, a right which is supported by an impressive array of authorities (*Allgeyer* v. *Louisiana*, 165 U. S. 578; *St. Louis Compress Co.* v. *Arkansas*, 260 id. 346; *Aetna Life Ins. Co.* v. *Dunken*, 266 id. 389; *Minnesota Association* v. *Benn*, 261 id. 140; *People ex rel. Kirkman* v. *Van Amringe*, 266 N. Y. 277; *U. S. Mortgage & Trust Co.* v. *Ruggles*, 258 id. 32; *Stone* v. *Penn Yan, K. P. & B. Railway*, 197 id. 279.) If this right may be abridged merely because of the inspection of risks and appraisal of losses here, then it is a right in theory only and of no practical value. The cases cited, however, emphasize the fact that situs does not confer upon the State the power to regulate. The necessary corollary to this doctrine is that inspections and appraisals, which have to do with the situs, do not confer such jurisdiction."

The Court of Appeals did not dissent from these views. Additional authorities (except the *Benn* case) holding various types of acts within the state insufficient as basis

for assumption of jurisdiction to regulate contracts entered into outside the state:

(a) Inspection of risks or losses.

Sasnett v. *Iowa State Traveling Men's Ass'n.*, 90 F. (2d) 514, certiorari denied 302 U. S. 711.

Kasprzak v. *Mutual Life Assur. Co. of Canada*, 1 F. Supp. 915.

French v. *People*, 6 Colo. App. 311.

People ex rel. McCall v. *Gilbert*, 44 Hun. (51 Sup. Ct.) 522, 524.

(b) Explaining transaction to prospective insured.

Palmetto Fire Ins. Co. v. *Beha*, 13 F. (2d) 500, 510.

(c) Handing prospective insured an application blank.

Minnesota Commercial Men's Ass'n. v. *Benn*, 261 U. S. 140, 144.

Connecticut Fire Ins. Co. v. *Way*, 62 N. H. 622, 623.

(d) Solicitation.

Green v. *C. B. & Q. Ry. Co.*, 205 U. S. 530, 533.

Minnesota Commercial Men's Ass'n. v. *Benn*, 261 U. S. 140, 143, 145.

Hyde v. *Goodnow*, 3 N. Y. 266, 271.

Western v. *Genesee Mutual Ins. Co.*, 12 N. Y. 258, 262.

Mas v. *Owens-Illinois Glass Co.*, 34 F. Supp. 415, 421.

(e) Recommendation by Subscriber.

Minnesota Commercial Men's Ass'n. v. *Benn*, 261 U. S. 140, 143.

Because of the highly specialized nature and the high type of risks insured and the professional methods used by appellants' engineers (R. 54, 55, 76), what these engineers do is far different from the usual "servicing" of

risks by stock companies, particularly casualty risks, where a rigid, continuous system of inspection is necessarily employed by the insurer to guard against ever-changing circumstances that constantly menace the safety of the insured premises and the lives of the employees, typified in the elaborate and intricate system of "servicing" of the Virginia casualty contracts in *Osborn* v. *Ozlin*, 310 U. S. 53, hereinafter discussed.

Appellants contend that as citizens of the United States their engineers "have the right to pass and repass through every part of it without interruption" (*Crandall* v. *Nevada*, 73 U. S. 35, 49, per Miller, J.; see also *Edwards* v. *California*, 314 U. S. 160), including the right to pass into New York State to inspect property in connection with insurance contracts entered into outside of the state without thereby subjecting appellants to far-reaching jurisdictional consequences.

It is plain that the presence or absence of contract within the state seeking to regulate is the determinative factor in the above cases—the doing of business for the purpose of regulation. Generally speaking, insurance business is the making of contracts, *Knights Templars' Indemnity Co.* v. *Jarman*, 187 U. S. 197, 204, and a state seeking to regulate such business cannot reach the contracts which constitute it unless the contracts have their situs within the state. If a state other than the state in which the contracts are made were permitted to regulate the contracts, such regulation would be an infringement upon the jurisdiction of the state of the *lex loci contractus*. The findings of the lower courts that appellants' contracts are made in Illinois therefore seems conclusively to prohibit jurisdiction in New York to regulate them. No case has been cited by opposing counsel where jurisdiction to regulate has been upheld in the absence of contract within the state. Proof of a course of making contracts, as dis-

tinguished from proof of isolated transactions, is generally required.

We also note that courts have upheld jurisdiction for service of process where the same circumstances would not warrant upholding jurisdiction to regulate. In the language of Cardozo, J., "activities insufficient to make out the transaction of business, within the meaning of those statutes (regulating foreign corporations), may yet be sufficient to bring the corporation within the state so as to render it amenable to process." (*Tauza* v. *Susquehanna Coal Co.*, 220 N. Y. 259, 267.) And again, the same judge stated that "business may be sufficient to subject the foreign corporation that does it to the service of process, and yet insufficient to require it to take out a license." (*International Text Book Co.* v. *Tone*, 220 N. Y. 313, 318.) Thus the Court has upheld service of process in cases (*Pennsylvania Lumbermen's Ins. Co.* v. *Meyer*, 197 U. S. 407; *Commercial Mutual Accident Co.* v. *Davis*, 213 U. S. 245) where the agent of a non-resident insurance corporation was present within the state clothed with the authority to enter into contracts of adjustment, although there was no proof of specific contracts having been entered into with the state. The Appellate Division in the instant case expressly found that no authority to bind is ever projected into the State of New York (R. 189).

In concluding this part of our discussion, we assert by way of summary that no contracts are ever made or countersigned within the State of New York; that appellants have no office in the state, no general or special agents, no district manager or other impedimenta therein; that there is no carrying on of an elaborate system of solicitation in New York, no commissions paid, no advertising, no employees, no incidental contracts, no bank accounts in the state, and that activities generally are localized in Chicago.

(2) The fact that appellants are licensed by the State of New York has no bearing on the question of jurisdiction to regulate.

At the time of the issuance of the New York licenses by Superintendent Conway in 1930 it was known that appellants' contracts were made in Illinois, and it was understood that they would continue to be made in that state. No attempt was ever made by the New York Department to regulate these contracts until the state amended its Insurance Law in 1939, when the threat of regulation was first made. Because of the long existence of these licenses, it would be dangerous to the reputation of appellants' cooperatives to surrender them. (Patterson, *The Insurance Commissioner in the United States*, pp. 90, 91.) The State of New York now seeks to take advantage of a situation it helped create by attempting at this late date to change the entire theory upon which the licenses were granted. In 1936, when the first countersignature statute was enacted, no attempt was made to force appellants to bring their contracts within the state for countersignature (R. 75).

Since the enactment of the taxing statutes of 1935 (substantially re-enacted as Section 552 of the Insurance Law of 1939) appellants have paid taxes to the State of New York measured by net deposits of New York Subscribers in the amount of several thousand dollars each year. This seems a high annual fee when we consider that all the Insurance Department does in return is audit the statements filed by appellants each year.

The appellants assert that the State of New York has in effect demanded that appellants either submit to the extraterritorial operation of the challenged statutes or give up their licenses. But it is axiomatic that a state may never compel a licensee to give up rights guaranteed by the federal constitution in order to obtain or retain a license.

New York Life Ins. Co. v. *Head*, 234 U. S. 149, 163.

Hanover Fire Ins. Co. v. *Harding*, 272 U. S. 494, 507.

Fidelity & Deposit Co. v. *Tafoya*, 270 U. S. 426, 434 (opinion by Holmes, J.).

Terral v. *Burke*, 257 U. S. 529, 532.

Palmetto Fire Ins. Co. v. *Conn*, 272 U. S. 295, 304 (opinion by Holmes, J.).

Although we made the above contention in the Court of Appeals, that Court wholly misconceived the argument, as shown by the statement in the opinion that we contended that although appellants were authorized to do business in New York, since they did no business in the state they must be treated as though unauthorized (R. 198). We never addressed that argument to any court and take this means of repudiating the imputation.

(3) Neither the location of the insured property nor the residence of the Subscriber in New York State can afford any basis for regulation by New York of appellants' Illinois contracts.

There can be no question under the authorities in this Court, as well as under the authorities generally, that neither the situs of the property nor the residence of the Subscriber in New York can afford any basis for the claim that New York has the jurisdiction to regulate these contracts. Moreover, the jurisdiction being in Illinois, a uniform standard of interpretation is assured. The application of any other rule would result in a conflict with the federal constitution.

An excellent statement of the general rule is found in *Clay Fire Ins. Co.* v. *Huron Salt Co.*, 31 Mich. 345, 354, where Groves, C. J., in an opinion concurred in by Campbell and Cooley, JJ., said as follows:

> "The contract was personal and not real, and although it had relation in a certain sense to realty, it

was not operative upon the estate, but merely as an agreement to pay money in case the erections, or other property specified, should be damaged by fire. The circumstance that the liability to pay was made to depend upon an event to real property here, did not make the contract a Michigan contract, or in any legal sense make the state the place of performance by the insurance company. And the further circumstance, that the contractee was a Michigan corporation, did not impress upon the contract the quality of locality, so as to cause our laws in regard to business done here by agents of foreign companies to affect it in point of law."

Cases in this Court which present the application of the foregoing principle in varying aspects under the due process clause are:

Aetna Life Ins. Co. v. *Dunken*, 266 U. S. 389, 399.

Home Ins. Co. v. *Dick*, 281 U. S. 397, 407, 408 (opinion by Brandeis, J.).

Hartford Indemnity Co. v. *Delta & Pine Land Co.*, 292 U. S. 143, 149.

St. Louis Cotton Compress Co. v. *Arkansas*, 260 U. S. 346 (opinion by Holmes, J.).

Minnesota Commercial Men's Ass'n v. *Benn*, 261 U. S. 140, 145.

Allgeyer v. *Louisiana*, 165 U. S. 578, 591.

Mutual Life Ins. Co. v. *Cohen*, 179 U. S. 262, 269.

New York Life Ins. Co. v. *Dodge*, 246 U. S. 357, 373.

New York Life Ins. Co. v. *Head*, 234 U. S. 149, 163.

A three-judge District Court sitting in the Southern District of New York in construing a prior New York statute recognized the constitutional safeguard as applying to a New York resident insuring property within the limits of the state by means of contracts entered into outside.

Palmetto Fire Ins. Co. v. *Beha*, 13 F. (2d) 500, 504.

This case was cited with approval in *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 436, in an opinion by Holmes, J.

Although the above rule has been settled in New York by a long line of decisions beginning with *Hyde* v. *Goodnow*, 3 N. Y. 266, 271, and including *People ex rel. Kirkman* v. *Van Amringe*, 266 N. Y. 277, 281, and *People ex rel. Sea Ins. Co.* v. *Graves*, 274 N. Y. 312, the Court refused to apply it to the instant case.

(4) The Court of Appeals wholly failed to apply the limitations of due process in the case at bar.

The Court of Appeals, ignoring the applicable authorities, found that appellants were doing business in New York and therefore subject to regulation (R. 197). Of course, conclusions of state courts as to mixed questions of law and fact may never be invoked to deprive suitors of rights guaranteed by the federal constitution.

First National Bank v. *Hartford*, 273 U. S. 548, 552, 553.

Provident Savings Life Assurance Society v. *Kentucky*, 239 U. S. 103, 112.

The decision of the Court of Appeals is based (R. 197) upon the definition of Section 41, subsection 3(a), of the Insurance Law (Appendix B) which defines an insurance business as "the making, as insurer, or proposing to make as insurer, of any insurance contract." In attempting to distinguish the Subscriber in his capacity as "insurer" from the "situation where the applicant for insurance to be issued to him solely as an *insured* mails an application for that insurance to a foreign company in a foreign state," where admittedly there is no jurisdiction to regulate, the Court says that the insurer (prospective Subscriber) signs a Power of Attorney in New York and confers thereby

power upon the Attorney-in-Fact to execute for him a contract of insurance so that he may become the insurer of hundreds of risks throughout the United States and Canada; that it matters not where the contract creating the obligation to pay the indemnity is made because "our resident is an insurer."

Needless to say no authorities are cited for so remarkable a proposition.

That the holding of the Court is based upon fallacious reasoning is readily demonstrable. The decision is necessarily based upon the untenable ground that the constitutional privilege here claimed does not extend to an insurer. The following are representative of cases in which the rights of the insurer under the due process clause were upheld and enforced.

Hartford Indemnity Co. v. *Delta & Pine Land Co.*, 292 U. S. 143, 149.

Aetna Life Ins. Co. v. *Dunken*, 266 U. S. 389, 399.

New York Life Ins. Co. v. *Head*, 234 U. S. 149, 163.

In the mutual benefit case of *Minnesota Commercial Men's Ass'n.* v. *Benn*, 261 U. S. 140, 143, 145, the constitutional privilege here claimed was enforced on behalf of the members of the association, each of whom stood "in the peculiar situation of being a party to both sides, insurer and insured." (*Korn and Wisemiller* v. *Mutual Assurance Society*, 10 U. S. 192, 201.)

The above language applied to members of a mutual association applies as well to the Subscribers in this inter-insurance. Nevertheless, the Court misplaced the emphasis. The primary object of an applicant desiring to participate in this indemnity is to save up to fifty per cent in his insurance costs, not to engage in the insurance business. Moreover, if the applicant sending in the Power of Attorney should be rejected, it cannot reasonably be said that during the pendency of his application he has

been engaged in the insurance business. If the applicant is accepted, however, the resulting contract comes into being, not in New York, but in Illinois, the state of acceptance.

Minnesota Commercial Men's Ass'n. v. *Benn*, 261 U. S. 140, 143, 144.

In *Hartford Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143, a bald attempt had been made by the State of Mississippi to avoid the limitations of due process. The state had enacted a statute that provided that "all contracts of insurance on property, lives, or interests in this state shall be deemed to be made there." But the Supreme Court of Mississippi, refused to hold the statute invalid, saying, "when the statute declares that such a contract shall be deemed to be made in this state, it means that the conflict of law between the two states is eliminated." This Court denounced the attempt to strike down the constitutional right, stating (p. 149):

> "The Mississippi statutes, so construed, deprive the appellant of due process of law. A state may limit or prohibit the making of certain contracts within its own territory (*Hooper* v. *California*, 155 U. S. 648, 39 L. ed. 297, 15 S. Ct. 207, 5 Inters. Com. Rep. 610; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557, 565, 566, 43 L. ed. 552, 555, 556, 19 S. Ct. 281; *New York L. Ins. Co.* v. *Cravens*, 178 U. S. 389, 398, 399, 44 L. ed. 1116, 1123, 1124, 20 S. Ct. 962); but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made. *New York L. Ins. Co.* v. *Head*, 234 U. S. 149, 58 L. ed. 1259, 34 S. Ct. 879, *Aetna L. Ins. Co.* v. *Dunken*, 266 U. S. 389, 399, 69 L. ed. 342, 349, 45 S. Ct. 129. Nor may it in an action based upon such a contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen. *Home Ins. Co.* v. *Dick*, 281 U. S. 397, 407, 408, 74 L. ed. 926, 933, 934, 50 S. Ct. 338, 74 A. L. R. 701."

We submit that there is no difference in principle between the above case and the case at bar.

The Court of Appeals limited its law to a case in the District Court, *Fireman's Ins. Co.* v. *Beha*, 30 F. (2d) 539 (affirmed on a procedural point in *Fireman's Ins. Co.* v. *Conway*,[1] 278 U. S. 580), where the insurance contracts were admittedly entered into within the State of New York and there was no question as to the jurisdiction of the state over them. The sole issue in that case was whether the state could require a non-resident insurer licensed and doing business in New York to conform to the financial requirements imposed upon domestic insurers as a condition to the retention of its license, although acts in relation thereto might be required of the insurer outside of the state. The Court answered this question in the affirmative. The case is not in point, nor did the appellees deem it of sufficient importance to cite in any of the courts below.

The Court of Appeals, implying that appellants derive a pecuniary or economic benefit from their New York licenses (R. 198), asserts that because of these licenses the Subscribers know that the minimum capital and the assets of the insurers must be substantially the same as those of domestic insurers, citing Sections 42 and 90 (Appendix B) of the Insurance Law. "These considerations" says the Court, "are helpful competitively in obtaining insurance business."

The element of competition cannot be present where the property owners simply carry their own insurance. It is as true today as it was in 1916 when the founder of these cooperatives in addressing the National Canners Convention said (Exhibit 21; R. 73, 314B):

"Another thing I wish to impress upon you is that

1. Albert Conway, having succeeded James A. Beha as Superintendent of Insurance of New York, was substituted as a party defendant in the Supreme Court of the United States. He was later elected to the Court of Appeals and wrote the opinion in the instant cause in the court below. As Superintendent of Insurance Judge Conway heard and passed upon appellants' applications for licenses in 1930.

Canners Exchange is cooperative and not competitive. It is not in competition with anyone or any insurance company. It is a plan for the canners to carry their own insurance and to pay only the cost. The United States Steel Corporation, the Standard Oil Company and other large corporations, we understand, carry a large part of their own insurance. They feel that they have a large enough number of separate risks to create an average and think they can therefore better afford to stand a loss now and then than to pay premiums on all their risks, and if they have a proper average they can. Because they do this, are they in the insurance business or are they in competition with the stock companies? Of course, not. They are simply carrying their own insurance. This is exactly what you canners are doing, except that no one of you have enough separate risks to make an average, so you join together at the office of Canners Exchange and accomplish the same result. You can really see that there is no competition, but you are merely securing your insurance at what it costs."

These remarks apply with equal force to Warner Reciprocal Insurers. Neither plan has ever been changed.

There has been no material increase in Subscribers during the past decade (R. 126, 142). The increase in deposits made by New York Subscribers (R. 141) therefore necessarily reflects the increased insurance needs of Subscribers for the period, and the taking out of the licenses had nothing to do with the increase. The enlarged volume of deposits is readily explained. Stocks of canned goods and groceries constitute the bulk of the insured property. The size and value of these stocks vary with the times, depending upon crops, economic conditions, markets, and other factors. The bottom of the cataclysmic depression having been reached early in the 1930s, values of canned goods and groceries, as well as of buildings and equipment, were unprecedently low. But as business conditions improved, inventories increased, both in amount and value. Appel-

lants' insurance coverage, and therefore the deposits, increased in proportion. This was true in New York as well as in the rest of the country.

The Court of Appeals next adverts to the statutes (R. 200). The discussion is confused. The Court says that if appellants were not authorized or licensed in New York and transacted no business in that state, the statutes would not be applicable, but since appellants are licensed, the sections (except Section 130 which it discusses separately) are applicable, the Court thereby ignoring the fundamental rule that a license cannot furnish a basis for the imposition of unconstitutional regulations. Section 130, which on its face applies only to the foreign insurer who "shall in this state issue, deliver or otherwise effectuate any contract of insurance," is by a piece of judicial amendment held to apply to appellants' contracts because "as indicated above, they (appellants) are doing business here."

The holding of the Court of Appeals that these Subscribers are doing business in New York in effect compels appellants to retain their New York licenses. Thus all of the challenged statutes become applicable to them. Therefore the Court's statement that the statutes apply only to authorized reciprocals is misleading. As the decision now stands, the only escape from regulation open to the New York Subscribers is for them to give up their insurance.

Why should these business men be compelled to give up carrying their own insurance and thereby add up to fifty per cent to their insurance costs simply because the State of New York has seen fit to impose a set of untried regulations upon them? Doubtless old line companies would like to see these cooperatives broken up so that appellants would be obliged to go into the open market and purchase insurance of them. It seems strange that the Court of Appeals would invoke a technicality to reverse the well-reasoned opinion of the Appellate Division

in order to prevent this reasonable cooperation among business men to lighten the charge upon business, where there is no public to be protected and no one is asking to be protected against the use of his own credit and business standing and the saving it gives to him. This is particularly true during the present period when many small business men are struggling for existence. We assert that cooperation among business men based upon mutual confidence and trust ought to be encouraged instead of discouraged or prevented altogether.

Authorities cited by Trial Term on issue of jurisdiction.

In making a case for jurisdiction in New York State the Trial Term cited two tax cases, referred to below, and *Osborn* v. *Ozlin*, 310 U. S. 53. Not one of these cases was mentioned by either the Appellate Division or the Court of Appeals. In citing the tax cases the Trial Term overlooked the principle that although taxation in a sense is regulation, the right to tax does not carry with it the right to regulate. The power to regulate includes the power to restrain or prohibit altogether, whereas in the case of taxation, the non-resident insurer escapes the prohibition by paying the tax. This distinction is recognized by Mr. Justice Holmes in the first of these cases, *Equitable Life Ass'n. Soc.* v. *Penn*, 238 U. S. 143, 147, where he said:

> "The fact that the state could not prevent the contracts, so far as that may be true, has little bearing upon its right to consider the benefits thus annually extended into Pennsylvania in measuring the value of privileges that it does grant."

And the same judge in his dissenting opinion in the second case, *Compania de Tabacos* v. *Collector*, 275 U. S. 87, 100, said:

> "It readily may be seen that a state may tax things that under the Constitution as interpreted it cannot prevent."

It is irrelevant that under these cases a state may tax a licensed foreign insurer and measure the tax by contracts entered into outside of the state, where either the insured, or the property, or both, are in the state, and the contracts are to be performed within the state. But if this were a tax case the authorities cited would still be inapposite because here there is no performance in New York. In taxation cases the license is of course important because the tax is the price charged for it.

In *Osborn* v. *Ozlin*, 310 U. S. 53, the case principally relied upon by the Trial Term for its adverse conclusion regarding jurisdiction, suit was brought by thirty-four non-resident casualty companies who maintained an elaborate agency system in the State of Virginia. Paragraph (7) (a) of the complaint filed in the District Court alleged in effect the doing of business for the purpose of regulation by averring the making of contracts within the State of Virginia, the language being that "*Each agent* plaintiff • • • *has countersigned* for his respective company or companies *large numbers of contracts* covering in Virginia some of which were produced outside of Virginia and some in Virginia. • • • *Due to the frequency of said countersignatures* the aggregate value of the services of each agent plaintiff has been very great, though the value of furnishing a single countersignature was trivial." This doing of business was also reflected in the finding of the District Court (29 F. Supp. 71) that, "Customarily, contracts produced outside of Virginia have been countersigned by the general agents and branch office managers without compensation." It goes without saying that countersigning and delivering the policies within the state, being the last effective acts to give the contracts validity, made them Virginia contracts.

The District Court also found other facts that independently of the foregoing constituted the doing of business in Virginia, including the finding that "The companies em-

ploy field supervisors to stimulate and guide the activities of local producers, *to accept or reject orders for contracts* from producers, *to underwrite, prepare and check contracts, to collect premiums* and *generally to represent the company* in a particular territory. The two major classes of field supervisors are: (a) The general agent . . . *In Virginia, the general agents produce the bulk of the local business.* (b) The branch office manager or salaried company representative who has the same powers and duties as the general agent, but is compensated by a salary and receives no commission for producing business. *Whenever a branch manager negotiates a policy directly with an assured,* the rule of the National Association of Insurance Agents, in which most insurers have acquiesced, *requires that the contract be closed through one of the manager's commission agents* who is paid the full producer's commission. The manager's function is to *develop his territory through ordinary producing agents* and to supervise and *assist them in the production of desirable business*" (italics supplied),—all in Virginia. This Court approved the above findings of fact in their entirety.

In addition to all this, the contracts, under the stock company agency system used by these companies, were performable within the state. An elaborate system of "servicing" was maintained by these companies; casualty suits were defended within the state and losses were adjusted and paid therein by the stock company adjusters. Other activities within the state were directed toward enforcing compliance at all times by the companies and assureds with the "network of legislation (which) controls the surety and casualty business in Virginia" (310 U. S. 63). Virtually everything pertaining to the business of casualty insurance in this myriad of ramifications was done within the state, and this Court assumed the doing of business within Virginia which the plaintiffs did not dispute. The examples of proper cases for state supervision given

in the opinion all presuppose the existence of jurisdiction to regulate (310 U. S. 65, 66).

There was no claim in the *Osborn* case that the statute requiring the countersigning of policies within the state was invalid. Plaintiffs had been doing this enormous mass of business within Virginia over a period of years and had submitted to the jurisdiction of the state to regulate its contracts, and the requirement that the policies be countersigned within the state was part of the system of regulation plaintiffs had submitted to. There was no attempt by Virginia to secure jurisdiction over the policies through the requirement of countersignature, and the complaint, in which three countersigning resident agents joined, alleged compliance therewith. The sole grievance was that that part of the Virginia statute was unconstitutional which forbade a salaried representative countersigning policies of insurance, but required the countersigning resident agent to collect all premiums paid thereunder and keep not less than fifty per cent of the commissions paid by the company for procuring the business.

The contention was made that because of the large commissions provided for the countersigning resident agent by the challenged statute, insurance costs outside the state would be increased and hence Virginia in effect would be regulating matters beyond her jurisdiction, but this Court disposed of this argument by saying that "The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids" (310 U. S. 62). Because of all this business done within the state "Virginia has taken hold of a matter within her power" (310 U. S. 62).

That the State of Virginia recognizes the inapplicability of the countersignature statutes to reciprocal insurance is shown by Sections 4235-c and 4340-a of the Virginia

Code, which specifically except reciprocal insurance from the operation of the statutes providing for countersignature.

Point II.

Equal Protection of the Laws.

The following sections are invalid and inapplicable because they deny to appellants the equal protection of the laws.

Section 412, Subsection 1.
Section 417, Subsection 1.
Section 418, Subsection 1.

Section 412, subsection 1 (Appendix A), prohibits the Subscribers from making "any new agreement for insurance" who do not have net assets in an amount not less than ten thousand dollars. The statute also provides that "before renewing a contract of insurance with a Subscriber" similar proof of financial responsibility shall be required unless the Subscriber has accumulated the operating reserve required by Section 418, subsection 1, hereinafter discussed, that is, twice the amount of the "annual premium" (the term being improperly applied to the initial deposit) or the Subscriber's pro rata share, determined on the basis of "annual premiums in force" of one-half of one per cent of the aggregate insurance in force.

Thus a canner or wholesale grocer who does not have net assets in excess of ten thousand dollars is forbidden to insure any new stock of goods, new equipment, new building or addition, or the like, although he would be permitted to renew a contract on subject matter covered by a previous contract if he had the operating reserves required by Section 418, subsection 1. Although the great majority of contracts entered into are on new subject matter (stocks of canned goods and groceries), neither group builds up reserves which meet the requirements of

Section 418, subsection 1, so as to allow them the privilege of renewing their outstanding contracts (R. 63, 64). Thus all Subscribers not worth the sum of ten thousand dollars or over are prohibited from carrying their own insurance. Such Subscribers constitute a "great number" of the entire membership in both groups (R. 79). The undisputed evidence is that Section 412, subsection 1, is simply an arbitrary provision that denies to the small business man the right to carry his own insurance, and that over thirty years' experience has proven that no necessity exists for such a provision (R. 79). The Trial Term found (R. 176) the said section invalid on the ground that it denies to the small business man the right to secure this insurance. The Court of Appeals in reversing did not even deem the rights of the Subscribers in this regard worth mentioning.

Truly this is legislation based on a "man's mere property status," which, "without more, cannot be used by a state to test, qualify, or limit" the rights of citizens. (*Edwards* v. *California*, 314 U. S. 160, 184.) There is no relation whatever between the requirement of this statute and the ability of a Subscriber to pay a liability arising out of his insurance contract. Thus a Subscriber having net assets of $12,000 would be permitted unlimited insurance and could incur a liability far in excess of his worth, while a Subscriber worth only $8,000 would be barred from carrying any insurance, or assuming a liability therefor of even one dollar. Other instances showing the glaring discrimination of this section could also be given.

It seems clear that this statute denies to appellants the equal protection of the laws.

Frost v. *Corporation Commission*, 278 U. S. 515, 522.

Louisville Gas & E. Co. v. *Coleman*, 277 U. S. 32, 37.

Cotting v. *Godard*, 183 U. S. 79, 109, 111, 112.

Engel v. *O'Malley*, 219 U. S. 128, 138.

Another objection to Section 412, subsection 1, is that no similar requirement is made for members of mutual fire insurance companies or persons desiring to insure their property in any insurance company.

Section 418, subsection 1 (Appendix A) referred to above, requires each Subscriber to build up an operating reserve by deducting each year not less than one-quarter of his "earnings as an underwriter" until he has accumulated the greater of these two sums: (a) Twice the amount of his premium, or (b) his pro rata share of an aggregate reserve of one-half of one per cent of the aggregate amount of insurance in force. But there is no premium in this co-operative insurance, nor has the provision for "earnings as an underwriter" any application to appellants for the obvious reason that they have no such earnings. Instead, the unused portion of the deposit to which the Subscriber has retained title throughout is returned to him each year.

Section 418, subsection 1, if applied to appellants would require the building up of unnecessarily large reserves. For over thirty years the present system of accumulating and maintaining reserves has proven adequate to meet all losses, expenses and contingencies. The reserve requirements of this section are new. No other state requires them. There are no comparable requirements for insurance companies (R. 81, 82). In holding the statute to be discriminatory, the Trial Term stated that if New York imposed similar requirements on stock companies it would put a great many of them out of business (R. 177). Moreover, the statute creates a joint liability as to these reserves—anathema to appellants' plan.

Section 417, subsection 1 (Appendix A), purports to require appellants to amend their contracts and Powers of Attorney so that they "shall provide for a contingent several liability for assessment of the Subscriber as an inter-insurer on the risks of every other Subscriber in an

amount not less than one nor more than ten times the amount of and in addition to the annual premium expressed in such contracts of insurance issued to the Subscriber by the reciprocal insurer." But Section 345, subsection 1 (Appendix B), of the Insurance Law relating to mutual fire insurance companies provides no limitation whatever to the contingent liability of members of a mutual company.

To impose Section 417, subsection 1, upon appellants would require them to remake their system. Here the liability of a Subscriber is one entire liability, definite and certain. The Subscriber must pay his several, separate, fractional share of all losses and expenses at all events, and limitation upon this liability would be inconsistent with the theory of the system. In contrast the term "contingent liability" implies two liabilities,—a fixed liability to the extent of the deposit and an additional liability, contingent on the happening of some event not specified. The term obviously has no application to this self-insurance. The use of the word "assessment" in the statute as applied to the case at bar is also without meaning.

Nor could liability be limited, as proposed by Section 417, subsection 1, without destroying the present plan (R. 81). This is the uncontroverted evidence. The statute would hybridize appellants' insurance with old line insurance. There is no premium or other amount of any designation "expressed in such contracts,"—can be none. In the very nature of things the cost cannot be determined until the end of the period of coverage. Appellants' initial deposit is made for convenience only.

The reserve requirements of Section 418, subsection 1, as compared with the reserve requirements for insurance companies, is a denial to appellants of the equal protection of the laws. Likewise the requirements of Section 412, subsection 1, and Section 417, subsection 1, as compared

with members of mutual fire insurance, is a denial to appellants of equal protection of the laws.

Concordia Fire Insurance Co. v. *Illinois*, 292 U. S. 535, 545, 549.

Hartford Steam Boiler Ins. Co. v. *Harrison*, 301 U. S. 459, 461.

Mayflower Farms v. *Ten Eyck*, 297 U. S. 266, 272, 274.

Frost v. *Corporation Commission*, 278 U. S. 515, 522.

Louisville Gas and E. Co. v. *Coleman*, 277 U. S. 32, 37.

McFarland v. *American Sugar Refining Co.*, 241 U. S. 79, 86.

Point III.

Unreasonable Regulation.

The statutes are invalid and inapplicable on the ground of unreasonable regulation.

In addition to violating the equal protection of the laws clause, each of the above three statutes is invalid and inapplicable as unreasonable and discriminatory regulations and prohibitions. The other statutes will now be considered in relation to the due process clause on the ground of unreasonable regulation. The following authorities illustrate the general principles applicable.

Nebbia v. *New York*, 291 U. S. 502, 525.

McLean v. *Arkansas*, 211 U. S. 539, 548.

C. B. & Q. R. Co. v. *McGuire*, 219 U. S. 549, 589.

Truax v. *Corrigan*, 257 U. S. 312, 332, 333.

Section 130.

Section 422, Subsection 1.

We contend that the construction given Section 130 (Appendix A) by the Court of Appeals does violence to the plain meaning of words because it emasculates the section of the condition precedent to its application, to-wit, that the foreign insurer "shall in this state issue, deliver or otherwise effectuate any contract of insurance," and substitutes therefor "doing business here," as defined by the Court of Appeals. The effect of this construction being to confirm the jurisdiction of the State of New York over appellants' contracts, we maintain that Section 130, as now construed, is invalid as an extraterritorial usurpation forbidden by the due process clause.

In general all risks fall into two classes: (a) The factories and warehouses of canners and the stores and warehouses of wholesale grocers; (b) Stocks of canned goods and groceries. The contracts in relation to the first class of risks are simply renewed from time to time. In the second class, new contracts are issued on inventories as they accumulate. The "turn-over" of these inventories is frequent. When a Subscriber receives a new stock he simply telephones, wires or writes the office in Chicago to cover the goods. There is never any difficulty. The parties do not deal at arm's length; on the contrary, a relation of mutual trust and confidence exists. Therefore transactions are frequently informal. If a mistake should be made it is easily corrected. There is nothing in the relation of appellants to require the superintendence of an outsider—at twenty-five per cent additional cost to the Subscriber.

Moreover, these being highly specialized risks, only a professional insurance engineer is qualified to "service" them. Ordinarily the resident agent would not be so

qualified (R. 76, 77). And the risks being limited to one or two in a particular vicinity in order to eliminate the conflagration hazard, it would be impracticable for the so-called resident agent to visit them. This the evidence shows (R. 75, 76, 77).

Section 130 should be read with Section 422, subsection 1 (Appendix A), which requires the maintenance of at least one office in the State of New York. Section 110, subsection 3 (Appendix B), requires the agent to be a soliciting agent compensated on a commission basis. We believe that one of the reasons for demanding that appellants cause their contracts to be countersigned by a resident agent is to secure commissions to the local agents. Manifestly the agency system has no place in this self-insurance; it would arbitrarily add approximately twenty-five per cent (R. 75) to the cost.[1] It is not denied in the record that the enforcing of Sections 130 and 422, subsection 1, against appellants, would result in the ultimate destruction of the system (R. 77, 83). We assert that the statutes are harsh, arbitrary, and unreasonable regulations.

Section 168, Subsection 2.

This statute (Appendix A) provides that "no policy or contract of fire insurance * * * shall be made, issued or delivered * * * on any property in this state, unless it shall conform in all particulars" to the standard fire insurance policy of the State of New York. The present section was repealed after the commencement of this litigation, and a new statute enacted, to take effect July 1, 1943 (Ch. 900, Laws of 1942). The new statute carries forward the same general objection as the present statute.

The question is whether appellants are to be permitted to make such changes in the New York standard policy as are necessary under their system of inter-insurance. Obvi-

1. See *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 255 *et seq.*

ously the statutory form of policy was prepared for insurance corporations, and the adaptation thereof to appellants' use has required many changes. Thus at the top of the first page of the contract (Exhibits 7, 9; R. 59, 228, 235) is substituted a paragraph containing a full description of the individuals, partnerships, and corporations who exchange the contracts. Next, the contract as adapted incorporates the Power of Attorney. Because a premium or price for this insurance cannot be stated, the usual language relating to premium has been eliminated, and the consideration stated is the exchange of insurance by the Subscribers. This is of the very essence of the insurance, and the requirement that a premium be stated is carried forward in the new statute. Toward the bottom of the same page of the policy is substituted another full paragraph setting forth the several nature of the Subscribers' liability and the manner in which it is determined. The contracts required to be used therefore cannot be made to "conform in all particulars" to the form prescribed without completely destroying the plan of insurance. The Trial Term (R. 176) permitted sufficient latitude to make the statute workable. We contend that the statute is void because unreasonable, arbitrary, and capricious, as well as because of lack of jurisdiction.

Section 410, Subsection 1.

Section 415, Subsection 1(d).

The first of these statutes (Appendix A) has to do with the "advisory committee" which, subject to the Articles of Association and Subscribers Agreement has ultimate powers of management. The Trial Term held that since appellants' Power of Attorney is in negation of such power the provision is rendered meaningless (R. 176). The Court of Appeals did not dissent from this construction. Section 415, subsection 1(d) (Appendix A) provides for a method

of electing advisors not unlike the one used by the canners group but differing from the one used by the wholesale grocers. As to the latter group the statute is one more unnecessary regulation (R. 80).

Section 415, Subsection 1.

The statute (Appendix A) requires all Subscribers to execute and acknowledge the Power of Attorney "in a manner sufficient for the acknowledgment of conveyances of real property to be recorded in the state in which such Subscriber is domiciled." The statute is of nation-wide application and it is difficult to instance a clearer case of extraterritorial legislation. New Subscribers cannot be accepted by any such loose method as would ever admit of a forgery or mistake in identity. It is a cumbersome and burdensome regulation, being unreasonable, arbitrary, and capricious (R. 80).

Section 413, Subsection 2.
Section 418, Subsection 3.
Section 420.

Section 413, subsection 2 (Appendix A), requires the accumulation of a special contingent surplus, or guaranty surplus, at the rate of one per cent of the insurers' net premium income for each such year until a minimum surplus of at least 250 thousand dollars is built up (Sections 411, subsection 4, and Section 341, subsection 1(a) (Appendix B)). The statute also provides that the fund thus accumulated shall not be impaired except upon liquidation.

Not that appellants do not have reserves in excess of the requirement of Section 413, subsection 2. The 1939 statement of Warner Reciprocal Insurers (Exhibit 11; R. 65, 247) shows reserve funds in excess of 400 thousand dollars, exclusive of unreturned savings of 228 thousand dollars, while the corresponding statement for Canners

Exchange Subscribers (Exhibit 12; R. 65, 255) shows reserve funds in excess of 2 million dollars, exclusive of 850 thousand dollars of unreturned savings; and the reports of the convention examinations of the National Convention of Insurance Commissioners made in 1937 (Exhibits 18, 19; R. 72, 284, 300) show the accumulated reserves substantially in excess of the minimum requirement of Section 413, subsection 2, but these reserves are of a totally different kind from those purported to be required by said Section 413, subsection 2. The reports of examination commend the "excellent" cash position of both groups (*Id.*).

Our reasons for challenging Section 413, subsection 2, are as follows: It is a fundamental principle of this self-insurance that each Subscriber retain title to all deposits and other funds, and that no one Subscriber's funds be used to pay the liability of another Subscriber, that is to say, that no joint liability be imposed, and that upon withdrawing from the plan a Subscriber shall get his money back. The statute, however, seeks to interpolate into the Power of Attorney provisions wholly subversive of this principle of several, separate ownership of the funds. Thus the statute provides that the surplus may not be "impaired" by "dividend distributions" to the Subscriber or by refunds or returns of continuing or retiring Subscribers' reserves or deposits except in the event of liquidation, and for the building up of reserves "at the rate of one per cent of its net premium income." The Trial Term held that a premium is alien to this insurance, "and the plaintiffs may not be compelled to introduce (into the policy) such false provision." (R. 175, 176.) Nor is there any measure by which these reserves are to be built up. The statute also refers to "dividends" to Subscribers, with the provision against "impairment" by "dividend distributions," which plainly is not applicable except by a loose analogy to the return of the unused portion of the deposit as a saving.

The worst feature of the statute is that it would eliminate the separate individual ownership of the funds making up the aggregate surplus and substitute therefor a joint fund. Thus title to the reserves would pass out of the Subscriber. Upon the Subscriber's withdrawal, the money would not be returned to him. In over thirty years of experience the Subscribers have never been obliged to fall back upon the reserves to pay a single loss or other obligation (f. 285), and any reserves built up under Section 413, subsection 2, would probably constitute a permanent fund. Only insolvency or liquidation would rescue the fund from permanent alienation; even then it would not be returned to the Subscriber.

The above considerations also apply to Section 418, subsection 3 (Appendix A), held invalid by the Trial Term (R. 177), and to Section 420.

In challenging these statutes appellants believe that they present no mere question of legislative policy, but a question of statutes actually prohibiting the continued existence of the system (R. 79, 80). To save this self-insurance is the reason the instant litigation was commenced. Moreover, appellees admit that no necessity exists for making the fundamental changes required by these sections. We contend that Sections 413, subsection 2, 418, subsection 3, and 420 are invalid on the ground of unreasonable regulation, as well as on the ground of lack of jurisdiction.

Section 421.

This statute (Appendix A) deals with accounting procedure. In so far as it requires the Attorney-in-Fact to maintain a separate account for each Subscriber, it corresponds with appellants' plan and no objection is made. But in attempting to apply such terms as "premiums earned by him as an underwriter" and "operating reserves", both of which are alien to appellants' inter-insurance, this section must fall with Section 418, subsection 1,

as unreasonable regulation, as well as for lack of jurisdiction (R. 82, 83).

Point IV.

Conclusion.

It has been said that the present tendency of the decisions of this Court is to allow the states a wider latitude than heretofore in legislation concerning purely local matters. We believe the necessary corollary to this view is that state legislation should be examined with increased scrutiny to make certain that, in the exercise of these broader powers, the state has not been guilty of exceeding the bounds of its jurisdiction or of denying rights guaranteed by the equal protection of the laws clause.

The practical effect of the New York statutes under consideration is to deny to all citizens of the United States in the State of New York the right to carry their own insurance. For if appellants were forced to comply with the New York statutes their cooperative insurance plan would cease to be, and some entity type of insurer, the precise nature of which is not certain, would be substituted. If it be required that the insurance contract state a premium or price charged for the insurance, if joint liability be substituted for the present several liability, if the individual ownership of the funds be eliminated, if the agency system be forced on these groups—then appellants' system of inter-insurance as it is known today will have passed out of existence, and one of the finest examples of cooperation among American business men will have become but a memory.

We pray that the judgment of the Court of Appeals of the State of New York be in all things reversed.

Respectfully submitted,

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APPENDIX A.

Statutes Sued Upon.

(Showing in italics particular provisions alleged.)

Insurance Law of 1939 of the State of New York:

SECTION 40, SUBSECTION 4. (Objectionable portion repealed during pendency of this litigation.)

SECTION 130, SUBSECTION 1. "Except as provided in subsection two, *no licensed foreign or alien insurer shall in this state issue, deliver or otherwise effectuate any contract of insurance covering* either persons resident in this state or *property situated in this state,* or covering any risk incident to the performance or non-performance of any contract or obligation to be performed in this state, or covering any risk incident to any obligation or duty which is governed by the laws of this state though actually to be performed elsewhere, *unless such contract of insurance is issued or effectuated through, or countersigned by, a resident licensed insurance agent of this state.* Within the meaning of this section, a licensed individual insurance agent shall be deemed to be resident in this state if he has his domicile or his principal place of business in this state, and a licensed corporation insurance agent shall be deemed to be resident in this state if it maintains a lawfully established place of business in this state; and a licensed firm or association insurance agent shall be deemed to be resident in this state if it maintains an established place of business in this state."

SECTION 168, SUBSECTION 2. "*No policy or contract of fire insurance, including a renewal of such policy or contract, shall be made, issued or delivered by any insurer or by any agent or representative thereof, on any property in this state, unless it shall conform in all particulars* as to

size of type, as to location of blank spaces, and as to all provisions, agreements and conditions, with such printed blank form of policy (the standard form of the National Convention of Insurance Commissioners; section 168, subsection 1); and no other or different provision, agreement or condition shall be in any manner made a part of such contract or policy, except as follows:" (Repealed as of July 1, 1943.)

SECTION 410, SUBSECTION 1. "Within the meaning of this chapter the term 'reciprocal insurer' shall mean any aggregation of persons, firms or corporations, herein called 'subscribers,' who or which under a common name engage in the business of inter-insurance or exchanging contracts of insurance on the reciprocal plan through an attorney-in-fact having authority to obligate the subscribers severally, within such limits as may lawfully be specified in the power of attorney, on contracts of insurance made with any subscriber as a policyholder through such attorney-in-fact acting on behalf of all other subscribers. For the purposes of this chapter, the term 'reciprocal insurer' shall include any reciprocal or inter-insurance exchange, by whatever name known, and any reference thereto as an insurer shall be deemed to mean any such aggregation of inter-insurers operating through an attorney-in-fact individually and collectively as an insurance organization for the benefit of its policyholders. *The term 'advisory committee' as used in this chapter, shall be deemed to include any official body, by whatever name called, which is chosen by the subscribers of a reciprocal insurer, and which has, subject to the articles of association and subscribers' agreement, ultimate power and responsibility in the management and control of the affairs of a reciprocal insurer.*"

SECTION 412, SUBSECTION 1. "*No authorized reciprocal insurer shall make any new agreement for insurance with any person, firm or private corporation who or which does not have assets in his, their or its own right in an amount*

not less than ten thousand dollars in excess of liabilities, as shown by a commercial agency report, as hereinafter provided, or by a sworn statement on file with the attorney-in-fact, verified by such subscriber or by an officer of a corporation subscriber.

Before renewing a contract of insurance with a subscriber, similar proof of financial responsibility shall be required unless the subscriber has accumulated and maintains the subscriber's operating reserve required by section four hundred eighteen. The report of an established commercial agency having one hundred thousand or more subscribers shall be deemed presumptive evidence of the financial condition of a subscriber."

SECTION 413, SUBSECTION 2. "*Every authorized reciprocal insurer,* at the end of the first and every succeeding calendar year following the effective date of this chapter, and in the case of a reciprocal insurer hereafter authorized, at the end of each full calendar year of doing business in this state, *shall accumulate and maintain a special contingent surplus, or guaranty surplus,* by whatever name called, *at the rate of one per cent of its net premium income for each such year* as reported in its annual statement, *until such contingent surplus shall be at least equal to the amount of minimum surplus required in section four hundred eleven* (two hundred fifty thousand dollars). *Such contingent surplus shall not be impaired by dividend distributions or by refunds or returns of continuing or retiring subscribers' reserves or deposits except in the event of the liquidation of such reciprocal insurer under order of a court.* Any such reciprocal insurer may set aside the entire amount of the contingent surplus herein required or accumulate such surplus at a rate in excess of that herein required; but such contingent surplus, once set aside, shall be thereafter maintained unimpaired except as to the amount, if any, in excess of the minimum surplus required by section four hundred eleven."

SECTION 415, SUBSECTION 1. *"Every subscriber of an authorized reciprocal insurer shall have executed a subscriber's agreement, and every subscriber hereafter executing such a subscriber's agreement shall execute and duly acknowledge the same, in a manner sufficient for the acknowledgment of conveyances of real property to be recorded in the state in which such subscribers is domiciled,* and every subscriber's agreement shall be identical in terms, except as to the date and the name and address of the subscriber, with all other subscriber's agreements currently in force and effect with all other subscribers of such reciprocal insurer. Every such subscriber's agreement shall contain in substance the following provisions:

• • • • •

(d) "A provision *that there shall be an annual meeting of the subscribers,* in person or by proxy, at a time and place to be determined in accordance with such agreement, of which each subscriber shall be duly notified and *at which each subscriber shall have power to vote in person or by proxy for all members of the advisory committee to be chosen or appointed at such time."*

(e) *"A provision specifying the powers and duties of the advisory committee,* which shall include the power and duty to regulate the compensation, powers and duties of the attorney-in-fact, if not specifically provided in the subscriber's agreement, and *shall also include the power to make regulations for the effective control and custody of the funds and investments of the reciprocal insurer."*

(Applicable only to Warner Reciprocal Insurers.)

SECTION 417, SUBSECTION 1. *"Every contract of insurance and every power of attorney of the attorney-in-fact or subscriber's agreement under or by which contracts of insurance are issued or exchanged by any authorized reciprocal insurer shall provide for a contingent several liability for assessment of the subscriber as an inter-insurer on the risks of every other subscriber in an amount*

not less than one nor more than ten times the amount of and in addition to the annual premium expressed in such contracts of insurance issued to the subscriber by the reciprocal insurer."

SECTION 418, SUBSECTION 1. *"Every subscriber of an authorized reciprocal insurer shall be required to accumulate a minimum operating reserve,* to be credited to such subscriber on the books and records of such reciprocal insurer, *by authorizing the attorney-in-fact to credit* to such account at the end of the fiscal year of such reciprocal insurer, *an amount not less than one quarter of such subscriber's earnings as an underwriter* during such period. Such accumulation shall be made if and at least *so long as such subscriber's operating reserve is less than the larger of the following amounts: (a) Twice the amount of the annual premium or premiums in force as of such date on all policies issued to such subscriber by the reciprocal insurer; or (b) such subscriber's pro rata share, determined on the basis of annual premiums in force, of an aggregate operating reserve for such reciprocal insurer equal to one-half of one per cent of the aggregate amount of fire insurance in force* in such reciprocal insurer as of such date."

SECTION 418, SUBSECTION 3. *"No subscriber shall have a secured or preferred claim against any assets of the reciprocal insurer arising out of such operating reserve, but all assets held by such insurer shall be available for the payment of claims of policyholders and creditors of such reciprocal insurer in preference to any claim for withdrawal* by a subscriber as such. Any subscriber's operating reserve accumulated by any such reciprocal insurer shall be maintained at all times, except that a subscriber may, upon withdrawal from membership and cancellation of all insurance contracts held by him in such insurer, and after giving to the attorney-in-fact written notice of withdrawal at least sixty days in advance, withdraw the amount of his operating reserve less such surrender charges as

may be deducted pursuant to the subscriber's agreement. No such withdrawal shall be permitted after an order of liquidation of, or the appointment of a receiver or liquidating trustee for, any such reciprocal insurer."

SECTION 420. "*All of the assets of any reciprocal insurer including subscribers' operating reserves shall be liable primarily for payment of all liabilities incurred under its policies or other contracts. No part of the surplus funds of such reciprocal insurer shall be subject to the claims of general creditors of any of the individual subscribers of such insurer until all policies under which any such subscriber is obligated have been terminated and in no event beyond the amount of such subscriber's operating reserve.* The contingent liability of subscribers for additional premiums or assessments shall not be included as an asset in the financial statement of a reciprocal insurer. Subscribers' operating reserves for which notice of withdrawal has been given shall be reported as liabilities until paid. *In any statement or report of the financial condition of a reciprocal insurer filed in this state, the surplus to policyholders, after providing for the unearned premium reserves, loss reserves and other liabilities, as required by this chapter, shall be reported as follows: 1. Special contingent surplus; 2. Subscribers' operating reserves; 3. All other surplus, if any.*"

SECTION 421. "The attorney-in-fact, in addition to the books of account of the collective transactions of all subscribers of the reciprocal insurer, shall keep and maintain a separate account for each individual subscriber setting forth the entries determining the operating reserve, if any, of such subscriber. *Each subscriber's account shall be credited with the premiums earned by him as an underwriter on the policies issued by the exchange, and charged with his proper share of all losses incurred under such policies as well as with the expenses incurred by the insurer.* Earnings and interest income from investments of

all subscribers' operating reserves shall be apportioned and credited to subscribers on the basis of their accumulated operating reserves and all other interest and investment income may be apportioned and credited to the subscribers on the basis of their premiums earned as underwriters."

SECTION 422, SUBSECTION 1. "The superintendent may, in his discretion, pursuant to section forty-two, issue a license to a reciprocal insurer domiciled in, or organized under the laws of another state or of any province of the Dominion of Canada, to do in this state such kind or kinds of insurance business as a domestic reciprocal insurer may be authorized to do in this state. Such foreign or alien reciprocal insurer shall comply with substantially the same requirements of this chapter which are applicable to domestic reciprocal insurers hereafter to be organized and authorized to do the same kind or kinds of insurance business and in addition every such alien reciprocal shall be subject to the provisions of this chapter relating to alien insurance companies authorized to do the same kind or kinds of insurance business. Nothing herein contained shall be deemed to require that the attorney-in-fact of a foreign or alien reciprocal insurer shall be resident or domiciled in this state, or shall maintain his or its principal office in this state, or shall be organized under the laws of this state; but *every authorized reciprocal insurer shall maintain at least one office in this state.*"

APPENDIX B.

Statutes Indirectly Involved.

Amendment of 1936 to the Insurance Law of the State of New York:

The Consolidated Laws of New York Annotated, Book 27, Insurance Law. SECTION 69, SUBSECTION a. *Issuance through resident agents of insurance risks by certain foreign insurance companies.* "No insurance company or insurer organized or existing under the laws of any other state or country shall issue or deliver any policy or make any contract of insurance on either persons or property in this state, or covering any hazard or risk in the performance or non-performance of any duty relative to any contract or obligation, performed or to be performed in this state, or in connection with any obligation or duty which is governed or controlled by the laws of this state, but actually to be performed by any individual, firm or corporation not resident in this state, unless such policy or contract is issued through or countersigned by a lawfully constituted and licensed resident agent of this state, provided nothing in this section shall be construed to apply to contracts or policies of life insurance, or to certificates of fraternal benefit societies, or to insurance covering the rolling stock of any railroad or any vessel, airplane, or motor bus used in interstate commerce, or to property in transit, or to reinsurance between companies.

Insurance Law of 1939 of the State of New York:

SECTION 41, SUBSECTION 3. The term "doing an insurance business," within the meaning of this chapter, shall be deemed to include (a) the making, as insurer, or proposing to make as insurer, of any insurance contract, and (b) the making, as guarantor or surety, or the proposing to make

as guarantor or surety, of any contract of guaranty or suretyship as a vocation and not as merely incidental to any other legitimate business or activity of the guarantor or surety, and (c) the doing of any kind of business, including a reinsurance business, specifically recognized as constituting the doing of an insurance business within the meaning of this chapter and (d) the doing or proposing to do any business in substance equivalent to any of the foregoing in a manner designed to evade the provisions of this chapter.

SECTION 42. *Requirements for foreign or alien insurer's license.* 1. Before issuing a license to do business, except by way of a renewal license, to any foreign or alien insurer the superintendent shall require it to submit for filing a certified copy of its charter, and of its by-laws, if any, currently in force, and such other documents as may be necessary to show the kind or kinds of business which it is empowered or authorized to do, and also a full statement verified by two officers or responsible representatives in such manner as the superintendent shall prescribe, showing its assets, liabilities and financial condition. The superintendent may also require a full statement of its income and disbursements, business done, and other facts required to be shown in the annual statement of such an insurer. Before issuing any such license the superintendent may make an examination of the affairs of such insurer at its principal office within the United States, or he may accept in lieu thereof a report of an examination made by the insurance department or other insurance supervisory official of any other state or of any government outside the United States. Before issuing any new or renewal license to any foreign or alien insurer hereafter applying for the same, the superintendent may require satisfactory proof, either in the charter of such insurer or by an agreement evidenced by a duly certified resolution of its board of directors, or otherwise as the super-

intendent may require, that such insurer will not engage in any insurance business in contravention of the provisions of this section, nor any insurance business which it is not empowered or authorized to do by its charter.

2. The superintendent shall issue a renewal license to any foreign or alien insurer if he shall be satisfied, by such proof as he may require, that such an insurer is not delinquent with respect to any requirement imposed by this chapter and that its continuance in business in this state will not be hazardous or prejudicial to the best interests of the people of this state.

3. No foreign insurer shall be licensed to do in this state any kind of insurance business, or combination of kinds of insurance business, which are not permitted to be done by domestic insurers hereafter to be licensed under the provisions of this chapter. No foreign insurer shall be authorized to do business in this state if it does in this state or elsewhere any kind of business, other than an insurance business and such business as is necessarily or properly incidental to the kind or kinds of insurance business which it is licensed to do in this state.

4. No alien insurer shall be licensed to do in this state any kind of insurance business, or any combination of kinds of insurance business, which are not permitted to be done by domestic insurers hereafter to be licensed under the provisions of this chapter. No alien insurer shall be authorized to do an insurance business in this state if it does anywhere within the United States any kind of business other than an insurance business and such business as is necessarily or properly incidental to the kind or kinds of insurance business which it is authorized to do in this state.

5. Except as otherwise specifically provided in this chapter no foreign insurer and no United States branch of an alien insurer shall be or continue to be authorized to

do an insurance business in this state if it fails to comply substantially with any requirement or limitation of this chapter, applicable to similar domestic insurers hereafter to be organized, which in the judgment of the superintendent is reasonably necessary to protect the interests of the people of this state.

No foreign insurer and no United States branch of an alien insurer which does outside of this state any kind or combination of kinds of insurance business not permitted to be done in this state by similar domestic insurers hereafter organized, shall be or continue to be authorized to do an insurance business in this state, unless in the judgment of the superintendent the doing of such kind or combination of kinds of insurance business will not be prejudicial to the best interests of the people of this state.

This subsection shall not be deemed to affect the requirements of section forty or of subsections one and two of section one hundred ninety-three.

6. Notwithstanding the provisions of subsection three, any foreign insurance company which has been licensed to do the business of life insurance in this state continuously during a period of twenty years next preceding the effective date of this chapter may continue to be licensed, in the discretion of the superintendent, to do the kind or kinds of insurance business which it was authorized to do immediately prior to the taking effect of this chapter.

Section 90. *Investments of foreign and alien insurers.* 1. The superintendent may refuse a new or renewal license to any foreign insurer, if he finds that its investments do not comply in substance with the investment requirements and limitations imposed by this chapter upon like domestic insurers hereafter organized to do the same kind or kinds of insurance business. The superintendent may recognize like securities of the home state of a foreign insurer as minimum capital investments in lieu of the

securities specified in paragraphs (b) and (d) of section seventy-nine.

2. No alien insurer shall be authorized to do business in this state unless its general state deposits and its trusteed assets comply in substance with the requirements and limitations of this chapter applicable to like domestic insurers hereafter organized to do the same kind or kinds of insurance business, except that foreign investments shall be allowed to the following extent only:

(a) Bonds, notes or other evidences of indebtedness issued or guaranteed by the government of the country in which such alien insurer was organized or by any province or other major political subdivision thereof and not in default as to principal or interest, may be recognized as reserve investments under section eighty-one in an amount not exceeding the minimum capital required of a domestic stock insurer hereafter organized to do the same kind or kinds of insurance business.

(b) Bonds, notes or other valid and legally authorized obligations issued, assumed or guaranteed by the Dominion of Canada or any province thereof which are not in default as to principal or interest may be included in the trusteed assets of such alien insurer in an amount not exceeding ten per cent of the total admitted assets of the United States branch of such insurer.

SECTION 110, SUBSECTION 3. The term "insurance agent" as used in this article, means any authorized or acknowledged agent of an insurer or fraternal benefit society, and any sub-agent or other representative of such an agent, who acts as such in the solicitation of, negotiation for, or procurement or making of, an insurance or annuity contract, other than as a licensed insurance broker; except that the term "insurance agent" shall not include any regular salaried officer or employee of a licensed insurer or fraternal benefit society or of a licensed insurance agent, who does not outside of an office of such insurer or agent

solicit or accept from the public applications or orders for any such contract, if such officer or employee does not receive for his services a commission or other compensation directly dependent upon the amount of business done.

SECTION 168, SUBSECTION 1. *Fire insurance contract; standard policy provisions; permissible variations; temporary contracts; combination policies; "mutual" and "stock" required.* 1. The printed form of a policy of fire insurance, adopted on the twelfth day of December, nineteen hundred sixteen by the National Convention of Insurance Commissioners (now known as the National Association of Insurance Commissioners) at its meeting in the city of New York and heretofore filed by the superintendent in his office pursuant to section three of chapter four hundred forty of the laws of nineteen hundred seventeen, together with such additions, omissions and modifications, similarly adopted from time to time by said association, as may be approved by the superintendent, shall be known and designated as the "standard fire insurance policy of the state of New York." Upon the payment of a fee of ten cents the superintendent shall furnish a true copy of such form to any person requesting the same.

SECTION 341, SUBSECTION 1(a). *Stock fire and marine insurance companies; organization; powers and financial requirements.* 1. A stock company may be organized in the manner prescribed in section forty-eight and be licensed to do an insurance business of the following kind or kinds, as specified in section forty-six, with the following requirements as to minimum paid-in capital, and with an additional requirement of paid-in initial surplus in each instance at least equal to the amount of its paid-in capital, and every such company shall at all times thereafter maintain a minimum capital at least equal to that hereinafter specified:

(a) If organized to do the business of fire insurance, as specified in paragraph four of section forty-

six, it shall have a capital at least equal to two hundred fifty thousand dollars, and it may in addition do any one or more of the kinds of business specified in paragraphs five, six, twelve, nineteen and twenty (excluding insurance in respect to, appertaining to or in connection with, any and all risks or perils of navigation, transit, or transportation, including war risks, on, over or under any seas, and excluding insurance against loss or damage and against liability for loss or damage, by reason of injury to the person) without having additional capital or surplus.

SECTION 345, SUBSECTION 1. *Mutual fire insurance companies; contingent liability; assessments; extraordinary reserve.* 1. Except as provided in section fifty-eight, every domestic mutual fire insurance company shall in its by-laws and policies prescribe the contingent mutual liability of its members for the payment of assessments, in such a way that each member shall be liable to pay his proportionate share, subject to the limitations hereinafter specified, of the amount of any assessment or assessments necessary to make good an impairment of the minimum surplus of such company. The contingent liability of a member may be limited to an amount not less than one additional annual premium on each policy held by him. No such insurance company shall make, issue or deliver any policy of insurance, except as provided in section fifty-eight, which does not prescribe the contingent liability of the policyholder in clear and explicit language printed in type not smaller than eight point.

SECTION 410, SUBSECTION 1. *Definition of reciprocal insurer; doing business without license; licensing.* 1. Within the meaning of this chapter the term "reciprocal insurer" shall mean any aggregation of persons, firms or corporations, herein called "subscribers," who or which under a common name engage in the business of inter-insurance or exchanging contracts of insurance on the reciprocal plan through an attorney-in-fact having authority to obligate

the subscribers severally, within such limits as may lawfully be specified in the power of attorney, on contracts of insurance made with any subscriber as a policyholder through such attorney-in-fact acting on behalf of all other subscribers. For the purposes of this chapter, the term "reciprocal insurer" shall include any reciprocal or inter-insurance exchange, by whatever name known, and any reference thereto as an insurer shall be deemed to mean any such aggregation of inter-insurers operating through an attorney-in-fact individually and collectively as an insurance organization for the benefit of its policyholders. The term "advisory committee," as used in this chapter, shall be deemed to include any official body, by whatever name called, which is chosen by the subscribers of a reciprocal insurer and which has, subject to the articles of association and subscribers agreement, ultimate power and responsibility in the management and control of the affairs of a reciprocal insurer.

SECTION 410, SUBSECTION 2. No person, firm, corporation or association as an underwriter or underwriters, and no reciprocal insurer, shall do any insurance business in this state, nor shall any person, firm, corporation or association as attorney-in-fact or other representative of any reciprocal insurer do or cause to be done within this state any act which effects, aids or promotes the doing of an insurance business in this state by any reciprocal insurer, unless authorized so to do pursuant to the provisions of this article.

SECTION 411, SUBSECTION 4. If within one year thereafter the superintendent finds, after such investigation and examination as he may see fit to make, that each subscriber has deposited in cash with the attorney-in-fact an amount at least equal to the premium specified in such declaration, and that a fund, at least equal to the amount of the minimum capital required of a domestic stock insurance company hereafter organized under the provisions of this

chapter to do the same kind or kinds of insurance business (Section 341, subsection 1(a)), has been advanced by the subscribers as a minimum surplus for policyholders, and is in the possession of the attorney-in-fact or invested subject to the control of the advisory committee, and that other requirements of this chapter applicable to such reciprocal insurer have been complied with, he may issue to such reciprocal insurer a license to do business.

SECTION 414, SUBSECTION 2. Every such existing reciprocal insurer and every authorized foreign reciprocal insurer, shall, within one year after the effective date of this chapter, have so revised its subscribers agreement and its articles of association, if any, as to conform to the requirements applicable to reciprocal insurers hereafter to be organized under the provisions of this article.

FILED
AUG 31 1942
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 358

HOOPESTON CANNING CO., E. PRITCHARD, INC., ET AL.,

Appellants,

vs.

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

JOHN J. BENNETT, JR.,
Attorney General of New York;
HENRY EPSTEIN,
Solicitor General of New York;
MILTON KAPLAN,
Assistant Attorney General of New York,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 358

HOOPESTON CANNING CO., A CORPORATION; E. PRITCHARD, INC., A CORPORATION; LANSING B. WARNER, INCORPORATED, A CORPORATION; HARRY M. BROWN AND JAMES T. SMITH, PAUL E. EMERSON AND BEN A. MORTON,

Plaintiffs-Appellants,

against

LOUIS H. PINK, AS SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AND JOHN J. BENNETT, JR., AS ATTORNEY-GENERAL OF THE STATE OF NEW YORK,

Defendants-Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

May it please the Court:

Now come the appellees in the above entitled cause, by their counsel of record, and move that the appeal herein be

dismissed, or that the order and judgment appealed from be affirmed.

Statement.

This is an appeal from an order and judgment of the Court of Appeals of the State of New York, and from the final order and judgment of the Supreme Court of the State of New York, Albany County, entered thereon, dismissing the above consolidated actions for a declaratory judgment.

Plaintiffs represent two groups of foreign reciprocal insurers authorized to transact the business of insurance in New York State. The facts are too lengthy for repetition here. They are fully set forth in the opinion of the Court of Appeals of the State of New York, a copy of which is attached as Exhibit H to Appellants' Jurisdictional Statement.

Issues Before the State Courts.

Copies of the opinions of the Supreme Court (Trial Term), Albany County, the Appellate Division of the Supreme Court, Third Department, and the Court of Appeals are attached as exhibits to Appellants' Jurisdictional Statement (Exhibits A, D, H). They reveal that the principal issue before the Courts below was whether the two groups of reciprocals were engaged in the business of insurance in New York State. The Court of Appeals, with a unanimous decision, upheld findings of fact of the Trial Court from which the conclusion necessarily follows that the plaintiff reciprocals are doing business in the State of New York, and that consequently a basis exists for their regulation (Exhibit H, Appellants' Jurisdictional Statement; 288 N. Y. 291, 299 [1942]). Aside from consideration of the findings of fact of the Trial Court both that Court and the Court of Appeals deemed it significant that the plaintiff companies have been licensed to do business

in New York State since 1930 and have submitted to regulation therein until the time these actions were instituted.

Secondly, the Court of Appeals held applicable and valid the various sections of the Insurance Law of the State of New York involved (288 N. Y. 291, 302). These statutory regulations apply alike to domestic and foreign authorized companies. Plaintiffs urged that at least one section (§ 130) could not be construed to embrace plaintiffs' local business activities; that these statutes interfered with their freedom of contract outside of New York State; that as applied to their type of business the New York State regulations were unreasonable and violative of the due process clause of the Fourteenth Amendment; and that certain sections were discriminatory, offending the equal protection clause of said amendment [§ 412(1), § 418(1), § 417(1)].

ARGUMENT.

The findings of fact of the New York State Courts established that plaintiffs' insurance coverage of New York State risks involve a substantial degree of local activity, and that their transactions in this State are continuous and voluminous. It is not the function of this Court to inquire into those findings or review the weight of evidence.

Whitney v. *California*, 274 U. S. 357, 367 (1927). From those findings it follows that the Legislature of the State of New York has jurisdiction to regulate plaintiffs' local insurance business. In view of the broad definition of State power in decisions of this Court supporting that conclusion, plaintiffs fail to present a substantial federal question in urging that New York State lacks power to police their New York State transactions in order to protect resident policyholders.

Osborn v. *Ozlin*, 310 U. S. 53 (1940);

International Harvester v. *Kentucky*, 234 U. S. 579, 586 (1914);

Lumbermen's Insurance Co. v. *Meyer*, 197 U. S. 407, 414, 415 (1905).

The construction of a State statute by the highest Court of the State is binding here and presents no Federal question.

J. Bacon & Sons v. *Martin*, 305 U. S. 380, 381 (1938).

Nor is there sufficient merit (to warrant review here) in the contention that the statutes are invalid because, although assuming a proper basis exists for State regulation, the statutes may have incidental repercussions beyond New York State borders.

Osborn v. *Ozlin*, 310 U. S. 53, 62, 63.

The Court of Appeals did not question the freedom of New York State to erect safeguards about the financial structures of authorized foreign and domestic reciprocal companies insuring local risks, or to require a minimum of local participation in their New York State transactions as a protection to resident policyholders. Their implicit holding lies within principles of State power frequently enunciated by this Court which leave no room for further argument—either on the ground that the statutes herein offend the guarantee of due process of law

Osborn v. *Ozlin*, 310 U. S. 53, 65, 66 (1940);

O'Gorman & Young v. *Hartford Fire Ins. Co.*, 282 U. S. 251 (1931);

German Alliance Ins. Co. v. *Kansas*, 233 U. S. 389 (1913);

or are obnoxious to the equal protection clause of the Fourteenth Amendment.

German Alliance Ins. Co. v. *Kansas*, 233 U. S. 389 (1913);

National Union Fire Ins. Co. v. *Wanberg*, 260 U. S. 71, 75 (1922);
Orient Insurance Co. v. *Daggs*, 172 U. S. 557 (1899).

Dated, August 18, 1942.

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Assistant Attorney-General of the State of New York,
Counsel for the Appellees.

The Capitol, Albany, New York.

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FEB 1 1943

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1942.

No. 358.

HOOPESTON CANNING CO., E. PRITCHARD, INC., *et al.*,

Appellants,

vs.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, *et al.*,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR APPELLEES.

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VINCENT KIEBALA,
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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1942.

No. 358.

HOOPESTON CANNING CO., a Corporation; E. PRITCHARD, INC., a Corporation; LANSING B. WARNER, INCORPORATED, a Corporation; HARRY M. BROWN and JAMES T. SMITH, PAUL E. EMERSON and BEN A. MORTON,

Appellants,

against

LOUIS H. PINK, as Superintendent of Insurance of the State of New York, and JOHN J. BENNETT, JR., as Attorney-General of the State of New York,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR APPELLEES.

Opinions of the Courts Below.

The opinion of the Court of Appeals of the State of New York, concurred in unanimously (R. 192), is reported at 288 N. Y. 291. The prevailing and dissenting opinions of

the Appellate Division of the Supreme Court, Third Judicial Department (R. 186, 190) are reported at 262 App. Div. 446, and the opinion of Mr. Justice Schirick, who held the Trial Term of the Supreme Court (R. 154), appears at 25 N. Y. Supp. (2nd) 312.

Statement of the Case.

The case comes here by direct appeal under Judicial Code 237-a (28 U. S. C. A., § 344-a) allowed by Mr. Justice Jackson (R. 215) from the final judgment of the Supreme Court of the State of New York (R. 204) entered upon the remittitur of the Court of Appeals (R. 201). That judgment held valid and applicable to the reciprocal insurance business of appellants, who are authorized to transact business in the State of New York, the regulatory measures of that State against a claim of invalidity under the Constitution of the United States.

The appellants, comprised of the plaintiffs in two separate actions consolidated upon the trial (R. 31), sought a judgment declaring the invalidity of designated provisions of the New York Insurance Law and restraining the defendants, who are the Superintendent of Insurance and the Attorney-General of the State of New York, from proceeding thereunder (R. 14, 28). On January 1, 1943, Nathaniel L. Goldstein succeeded John J. Bennett, Jr., as Attorney-General and his substitution will be stipulated upon the argument.

Findings of fact were made by the Trial Court (R. 115-148), upon which judgment was entered sustaining the jurisdiction of the State over appellants but holding invalid some portions of the statute (R. 149 to 153). The Ap-

pellate Division reversed and directed judgment declaring the statute invalid and inapplicable to appellants (R. 181). It reversed three findings of fact and added four of its own. The Court of Appeals found the weight of evidence against the Appellate Division as to all but an "unimportant" portion of the reversed findings (R. 197) and directed judgment of reversal dismissing the complaint (R. 203).

The findings of fact, supported by evidence, present no issue for this Court (*Whitney v. California*, 274 U. S. 357), and we are concerned only with the question of the power of the State under the Federal Constitution with respect to a business such as that involved herein, with the volume, continuity, kind and degree of local activity found to characterize it. Probable jurisdiction was noted by this Court on October 12, 1942 (R. 325).

The Statutes.

The statutory provisions involved are each a part of the New York State Insurance Law of 1939 (Laws of 1939, Chapter 822; Consolidated Laws, Chapter 28), hereinafter referred to as the "Insurance Law." The pertinent portions are set out at length in the Appendices to the Brief for the Appellants and are, therefore, not repeated except as parts thereof may be hereinafter quoted in connection with specific points of the argument.

Statement of Facts.

It is natural that the appellants should emphasize the history of their own organizations and stress the general scope of their activities together with the studious concentration of the formalities of execution of contracts through the agent or attorney in fact in Chicago (R. 125; Finding

of Fact No. 18, requested by plaintiffs). The appellees, quite as naturally, have a different perspective and are concerned with the realities of the entire insurance transaction, particularly in its local aspects, not alone with respect to these appellants but with regard to the State's general regulations of any persons, organizations or corporations engaging in such transactions, designed to set adequate protective standards within its borders.

The appellant Lansing B. Warner, Inc., is not the insurer under these plans. The Corporation is but the agent or attorney in fact for the subscribers (R. 46). In the Warner Reciprocal Insurers plan it is called an agent and the subscriber is referred to as "the principal." The Canners Exchange instrument designates the corporation as an attorney in fact (Exhibits 5 and 6, R. 222, 225, admitted at R. 57). In the former the agent is authorized to "effect an exchange of insurance between the Principal and other insurers." The latter empowers the corporation to "exchange insurance among subscribers." By entering into a contract to exchange insurance through the attorney in fact, the subscriber becomes an insurer of every other subscriber as well as becoming himself insured (R. 86, 104). The attorney in fact is, therefore, but the conduit or instrumentality through which reciprocal agreements are made among many thousands of insurers to spread their individual risks. It appears from the testimony that it is necessary to have a large "spread" of subscribers in order that the system may work advantageously (R. 87). It is a necessary expedient that these agreements be formally accomplished through an agent in order to avoid thousands of signatures on each subscriber's contract and that there be a clearing house for the correlation of risks and adjustment of losses for the benefit of all on an experienced basis

(R. 85). The authority of that agent derives directly from the instruments constituting it an attorney in fact and those instruments as to New York reciprocal insurers, who thus obtain insurance on their own New York risks and become insurers of others in New York, as well as elsewhere, are executed in the State of New York (R. 101, 144, 197). There are about 925 subscribers throughout the country in the Canners Exchange group of whom 93 are located in New York. In the Warner's reciprocal group there are about 230 New York subscribers out of a total of about 2100 in the United States and Canada (R. 51).

About 50,000 contracts affecting New York State risks have been executed in the operation of the plans (R. 140). Gross risks written in this State by Canners Exchange have progressed from approximately $23,000,000.00 in 1921 to more than $81,000,000.00 in 1938; for Warners Reciprocal Insurers the increase in gross risks written in New York for the corresponding period has been from approximately $7,000,000.00 to over $38,000,000.00. As evidenced by net premiums, the business of Canners Exchange rose progressively from $105,786.86 in the year 1931 to $298,284.57 in 1938; Warners Reciprocal Insurers' receipts for a corresponding period went from $28,529.88 in 1931 to $95,162.82 in the year 1938 (R. 140-141).

Comparison of the New York business of the groups involved for the years 1940 and 1941 with the domestic reciprocal having the largest amount of business gives a clear indication of the great volume of New York coverage. Affiliated Underwriters a New York reciprocal insurer, in 1940 had net premiums in New York of $143,017.00 The Canners Exchange had such premiums amounting to $173,092.00, and the Warners Reciprocal group $105,669.00 (82nd Annual Report of Superintendent of Insurance,

State of New York, Vol. II, pages 85-a, 92-a, Legislative Document 1941, No. 34). In 1941 both of the groups herein far exceeded in volume of New York net premiums the business of the largest domestic reciprocal, which was again Affiliated Underwriters. The latter's net premiums amounted to $161,313.00, while the amounts for the Canners Exchange and the Warners Reciprocal groups were $248,092.00 and $197,293.00, respectively (Statistical Tables from New York Insurance Report 1942, Advance Printing, pages 98, 105).

Although the appellants' exchanges operate in all but a few States, the premiums or "deposits" received from New York risks substantially exceed those of other States. For example, Schedule T of the 1938 Annual Statement for Canners Exchange shows direct writings in New York amounting to more than three times those for Illinois, where appellants claim to have completely localized their business beyond the reach of any other jurisdiction (R. 321, Defendant's Exhibit P, admitted at R. 114). It is of interest here to note that a different form of contract is used in Illinois than elsewhere (R. 106).

In considering the nature of appellants' local transactions it is essential to bear in mind that the case involves no insurance company in Chicago with whom subscribers deal independently of each other and only as insureds, but that each agrees to underwrite a ratable portion of the loss of every other. The appellants dislike the term "underwriter" as applying to a subscriber but agree that each bears his portion of the losses (R. 86). While there is no formal legal entity, the subscribers have a community of interest and are dependent upon each other to keep losses low (R. 90, 143). The cost is borne by the payment of

initial and subsequent "deposits" for which separate accounts are maintained (R. 61) although the funds are commingled (R. 143), out of which losses and expenses are paid, a reserve fund accumulated and "savings" returned to the subscriber (R. 64).

Against this background of insurance participated in directly by all those protected thereby, the activities in the State of New York by them and on their behalf can be best appraised with respect to the development, administration and general conduct of the business. The appellants agree that they are interested in keeping down losses and in bringing in only solvent and careful new members who will be good moral hazards (R. 89). There are no agents labeled "solicitors." Instead, a present subscriber usually "recommends" the plan to one in the same business and either he or the prospective subscriber will write in for an explanation (R. 53 and 54). The representatives of appellants, who are sent out from Chicago, are not "professional" but "insurance" engineers (R. 54, 148). The present subscribers are consulted to determine the standing of the prospect (R. 54) and an investigation is made from New York sources as well as others (R. 126), including correspondence with New York subscribers (R. 93, 94). One of the engineers then calls upon the prospect to explain the operation of the plan and inspect the property which is to be the subject of the risk (R. 92). The interview by appellants' engineer with a prospective subscriber may take place before the latter has sent an application to the Chicago office and before he has made any request for information (R. 100, 144). The engineer may "recommend" acceptance of a new subscriber to the Chicago office (R. 55). His activities incident to the determination of such a recommendation take place in the

State of New York, as do those of the present members whose interests are directly affected by the procurement of new subscribers (R. 94). Whether called "solicitation" or "recommendation" and "explanation", the method pursued in New York State is that by which new members are procured for an insurance plan by and on behalf of the persons who are an integral part of it.

The engineers (agents) likewise "keep in fairly constant touch" with subscribers as to the best ways to lower their hazards by installation of protective devices and taking fire retarding measures (R. 54). They "service" outstanding contracts in keeping risks low as well as investigate and consult with prospective subscribers in order to determine their qualifications from the standpoint of their practices in managing the property to be insured (R. 55, 98). Such activities can be engaged in only at the physical location of the risk (R. 98).

Other duties essential to the operation of the plan to protect the interests of all parties to it necessarily take place in New York. In the event of a substantial loss an inspector visits the scene to examine the ruins, determine the causes of loss and report so that the risk may be minimized in the future (R. 66) and to furnish a basis of adjustment of the loss with the subscriber (R. 112).

Both groups of insurers are authorized by the Superintendent of Insurance to transact business in the State of New York (R. 71, Plaintiffs' Exhibits 16 and 17, R. 280, 281) and have paid New York taxes since 1935 or 1936 (R. 73). They are desirous of retaining their license to do business in this State (R. 74) because of the advantages deriving to New York subscribers, who have the right to

sue in New York courts, because the Superintendent of Insurance may be appointed their attorney for service of process and because annual statements are filed with him for the inspection of any subscriber who desires to see them (R. 75). The reasons were eloquently characterized by appellants' counsel in his opening statement to the Trial Court as follows;

> "We want to meet the subscriber, your citizen of New York, on his home ground, * * *" (R. 40).

In the same voice appellants vigorously assert that they are not doing any business whatever in New York State and deny that they are within reach of the State's regulations.

Summary of Argument.

POINT I.

Appellants are engaged in the business of insurance. Reciprocal insurance is subject to State regulatory power. Appellants carry on business in the State of New York. The question of doing business is a primary one of fact. Appellants' transactions fall within the applicable statutory definition and the principles of the adjudicated cases. The formal execution of the contract is not decisive upon any realistic view of the nature of the appellants' transactions as a whole, the continuity and volume thereof and the substantial local activity essential thereto. In such cases the location of the risk is an important factor in determining the extent of the State's protective power. Appellants have subjected themselves to the regulatory jurisdiction of New York. Their authorization to do business requires compliance with the applicable provisions of the

Insurance Law and they may not be licensed for special or limited purposes of their own apart from the transaction of business in the State.

POINT II.

The Insurance Law was not an attempt by the State of New York to regulate matters beyond its borders and outside its local interest, or to interfere with private contractual rights. Regulations justified by proper governmental interest in the subject matter may not be invalidated because of incidental effect beyond the State. The assailed provisions concern matters within the legitimate concern of the State of New York and, considered in their application thereto, are each a valid and reasonable regulation.

ARGUMENT.

POINT I.

Appellants are doing an insurance business within the State of New York and are subject to licensing and regulation under the New York Insurance Law.

A. Appellants are engaged in the insurance business and are subject to regulation in the public interest.

The State Courts below have found that appellants are engaged in the insurance business (R. 117, 143, 163, 197). In pressing their appeals to the Court of Appeals appellants did not contest this holding and do not do so here.

The exchange of similar contracts in the State of New York was held to be the business of insurance in *People*

v. Roschli, 275 N. Y. 26, 29. The business of one of the exchanges involved in the present case was also the subject of litigation in *Thomas Canning Co. v. Canners Exchange Subscribers at Warner Inter-Insurance Bureau*, 219 Mich. 214, 189 N. W. 214, where the highest Court of Michigan held that the exchange of inter-insurance contracts is the business of insurance.

Since the decision of this Court in *German Alliance Insurance Company v. Kansas*, 233 U. S. 389, it has not been open to question that the business of insurance "so far affects the public welfare" as to be within the regulatory jurisdiction of the State and, indeed, to require exercise of that power (p. 412). While it involves personal contracts of indemnity, they have greater public consequence than those the effect of which stops with the individual. One of the fundamental grounds of the public interest expressed by this Court is the function of insurance to distribute the expense of loss and disaster over a wide area. Contracts of insurance were said to be interdependent and not to be regarded singly. There is, therefore, an even more direct public interest in the safeguarding of plans of reciprocal insurance, like those here involved, wherein members of the public undertake directly by many inter-related contracts with each other to protect themselves from the hazards common to their businesses.

B. Appellants are carrying on the business of insurance in the State of New York.

1. *The provisions of the Insurance Law with respect to "doing business."*

Article IV of the Insurance Law sets out licensing requirements for foreign insurance corporations in New York State. Section 40 provides in part:

"§ 40. Insurer's license required; issuance, revocation or suspension of license

"1. No person, firm, association, corporation or joint-stock company *shall do an insurance business in this state unless authorized so to do by a license issued and in force pursuant to the provisions of this chapter,* or unless exempted by the provisions of this chapter from the requirement of having a license to do business." (Emphasis supplied.)

The phrase italicized above—"do an insurance business"—is defined in the following section:

"§ 41. • • •

"3. The term 'doing an insurance business,' within the meaning of this chapter, shall be deemed to include (a) the making, as insurer, *or proposing to make as insurer,* of any insurance contract, and • • • (c) *the doing of any kind of business,* including a reinsurance business, *specifically recognized as constituting the doing of an insurance business within the meaning of this chapter and* (d) the doing or proposing to do any business in substance equivalent to any of the foregoing in a manner designed to evade the provisions of this chapter." (Emphasis supplied.)

In order to round out the applicable definition of "doing business" reference must be made to Article XII, dealing with reciprocal insurers. Section 410 of that Article, defining "reciprocal insurer," expresses the essential feature of the business under scrutiny herein, and further defines the "doing of an insurance business" by reciprocal companies as including "any act which effects, aids or promotes the doing of an insurance business in this state by any reciprocal insurer." A "reciprocal insurer," as the term is used in the Insurance Law, is any aggregation of inter-insurers operating individually and collectively through an attorney-in-fact having authority to obligate the subscribers (or inter-insurers) severally.

Section 410 (1), by Section 41 made a part of the definition of "doing business" in the Insurance Law, establishes a statutory signpost pointing out the *self-insurance* feature as one to be reckoned with when reciprocal companies are the subject of the inquiry.

The above definitions reveal that the Legislature did not intend to stop by inquiring whether a foreign insurance company is "making" contracts, or "executing" contracts within New York State before exacting compliance with our licensing regulations. Simply "proposing to make" insurance contracts in New York State brings the foreign company within the Insurance Law. For the purpose of clarifying terminology repeatedly used in this and appellants' brief it should be noted at this point that the phrase "making contracts" may be used in its more inclusive sense to embrace the various steps necessary to effectuate insurance. That meaning is to be distinguished from the one usually intended by appellants, who persistently emphasize the one aspect of "executing" or "consummating" the contract, or "making it binding."

The New York Courts did not, in deciding this case, nor do we, rest upon the mere findings that the specific statutory requirements of "doing business" alone have been satisfied. The findings of the State courts, herein referred to, are broad enough to support their decision in conformity with the realities of appellants' transactions and the application of established principles governing the reach of State power under the Constitution.

2. *The principles applicable to the issue of "doing business."*

There is presented here no issue of the validity or interpretation of private contracts as between the imme-

diate parties thereto *(cf. Boseman v. Connecticut General Life Insurance Company,* 301 U. S. 196), nor of the personal liberty of one seeking insurance to go beyond the borders of the State to obtain it, which lies at the basis of the holding in *Allgeyer v. Louisiana,* 165 U. S. 578, and those cases stemming from it. This is the short answer to appellants' argument, derived from the formal execution of contracts in Illinois by the attorney in fact on behalf of the insurers, that such contracts must be governed by Illinois law exclusively. The issue here is between the State exercising the public power and those conducting a reciprocal insurance business with respect to whether their operations in the course thereof bring them within the reach of the State's jurisdiction.

No question arises as to the power to regulate such a business deriving its original authority from a foreign State where it is transacted within the regulating State. Fundamentally, that question is one of fact to be determined upon the circumstances of individual cases *(International Harvester Company v. Kentucky,* 234 U. S. 579).

The cases present no rigid mathematical formula determining when business conducted across State lines is carried on or done in a State within the meaning of that State's statutes. In fact, this Court refuses to chart a course to be followed in the cases. *(St. Louis, Southwestern Ry. Co. v. Alexander,* 227 U. S. 218 (1913); *International Harvester Co. v. Kentucky,* 234 U. S. 579, 583 (1914).) But appellants offer such a formula. They argue: The contracts of insurance herein are "made" in Illinois. In expanding this idea they refine "made" in Illinois to "executed" in, "consummated" in, or "made binding" in

Illinois. An insurance company is doing business only in the State where the insurance contract is executed or where the contract is made binding, they contend. In this case that State is Illinois; therefore, they conclude, appellants are not doing business in New York State and cannot be required to fall in line with New York State regulation.

Appellants add a further criterion in insisting they are not doing business here because there are allegedly no "solicitors" present in this State. They derive their definition of "solicitation" from cases involving traditional methods of transacting insurance or other businesses by means of paid employees or agents known as "solicitors."

In the first place, reality and a fair appraisal of the essence of appellants' reciprocal insurance business warrant a more discerning definition of "solicitation." Secondly, we are free to inquire beyond the outward symbols like "execution" and "solicitation" to discern whether or not businessmen are "doing" their business, as did the Court of Appeals below.

The broad power of the State to regulate the business of insurance conceded by this court's decisions has not been characterized by restrictive formalities in the case of foreign corporations. Where the State has a legitimate interest in the subject matter and there are phases of the conduct of the business within its reach, its reasonable regulations will be upheld. *(Osborn vs. Ozlin,* 310 U. S. 53.)

The fact that agents or employees of foreign corporations are not permitted to effect binding contracts in the

State claiming jurisdiction does not preclude a finding that the foreign corporation is doing business therein.

International Harvester Co. vs. Kentucky, 234 U. S. 579 (1914);

Pennsylvania Lumbermen's Mutual Fire Ins. Co. vs. Meyer, 197 U. S. 407, 414, 415 (1904);

Tauza vs. Susquehanna Coal Co., 220 N. Y. 259, 265 (1917).

In the *International Harvester* case the foreign corporation restricted the activities of its "travelers" in Kentucky to taking orders "subject to the approval of the general agent outside of the State" (234 U. S. 579, 584). The travelers did "not have authority to make a contract of any kind in the State of Kentucky." Nevertheless this Court held the company was doing business in Kentucky, giving the latter State jurisdiction in order to prosecute the company for violation of its anti-trust laws. As in the case at bar that litigation involved discipline and regulation—more than a mere controversy between private individuals.

And in *Thomas Canning Co. vs. Canners Exchange*, 189 N. W. 214, 217, 219 Mich. 214, where the business of appellant herein, Canners Exchange, was under investigation, the highest Court of the State of Michigan stated that, to the extent the company authorized its agents to engage in various activities within Michigan, "it is doing business in this state regardless of whether the policies it issues are to be construed as contracts made in this or another state."

In *Equitable Life Society vs. Pennsylvania*, 238 U. S. 143, the insurance company authorized to do business

therein was held within reach of Pennsylvania's taxing power as to premiums paid outside the borders of that State on the ground that it was doing business in the State inasmuch as "many incidents of the contract are likely to be attended to in Pennsylvania". In *Palmetto Insurance Co. vs. Conn*, 272 U. S. 295, a Michigan contract of insurance under which a certificate of insurance was sent to a third party who purchased an automobile in Ohio was held to subject the company to Ohio's taxing power on the ground that such acts made "effective" in Ohio the agreement to insure for the benefit of purchasers of automobiles covered thereunder.

If there be distinction in the various cases with relation to doing business based on the different issues to which that question is relevant, namely service of process, taxation and regulation, it is one of degree only.

Appellants may not wholly dismiss as inapt all analogies found in those decisions. In any event, in *Osborn vs. Ozlin*, 310 U. S. 53, this court has brought to full recognition the principle that the interest of a State in local risks insured under contracts executed elsewhere in the course of essential local activity incident to the "organic whole of the insurance business" supports regulatory jurisdiction.

The court will take a realistic view of the elements involved in a question of carrying on business within the borders of this State to the end that the authority of the State may not be evaded by subterfuge or emphasis on mere formulas and technical distinctions.

Hooper vs. California, 155 U. S. 648, 658.

Palmetto Fire Insurance Co. vs. Conn, 272 U. S. 295, 305.

3. *The Nature of Appellants' Transactions in New York.*

Consideration of appellants' local activities in the State of New York reveals a course of "doing business" therein involving matters which are of the very essence in formulating and effecting their contracts of insurance and in performing the obligations assumed thereunder. It must first be reiterated that the actual insurers are the subscribers themselves, including those resident in New York.

Judge Conway, writing the opinion for the Court of Appeals, placed special emphasis upon the self-insurance feature of appellants' business and its obvious implications (288 N. Y. 291, 299-300).

> "Each subscriber and each principal is an insurer and initiates within this State his contract of inter-insurance. This is not a situation where the applicant for insurance to be issued to him solely as an *insured* mails an application for that insurance to a foreign company in a foreign State. In this instance the insurer, resident here, signs a power of attorney or appointment of agent within this State and confers thereby power upon the attorney or agent to execute for him a policy of insurance so that he, our resident, may become the insurer reciprocally of hundreds of risks throughout this country and in Canada. Our resident is an insurer and it matters not where his attorney or agent executes the contract of insurance by which he is bound. Thus Insurance Law, section 41, subdivision 3, now provides: 'The term "doing an insurance business," within the meaning of this chapter, shall be deemed to include (a) the making, as insurer, or *proposing to make as insurer*, of any insurance contract * * *.' The two reciprocal insurers are but the aggregations of the subscribers and principals. (Ins. Law, §410.)" (R. 197.)

The document which forms the keystone of the entire system and from which springs the initial authority by

which residents of New York are constituted insurers of the risks of other subscribers, including those in that State, is the power of attorney. This absolute essential to the effectuation of the formal contracts under which New York residents assume the obligations of insurers, as well as obtain protection of their own risks, is executed in New York. The contracts themselves are merely signed in Chicago by the agent thus authorized because of the practical impossibility of exchange of the documents among the real parties.

However, appellants still insist that New York State may not regulate their business here because the applications of new subscribers are allegedly *accepted* at the Chicago office. The place of acceptance of a contract may be significant in its proper judicial setting; *e. g.*, in questions arising in the law of contracts, or questions concerning purely choice of law where the sole issues revolve about the acts of execution of contracts as determinative of vested rights. Where, however, there is a good reason to look at the whole business under inquiry in its unbroken sequence, there is no rule of law that gives controlling effect to the sole item of acceptance. The acceptance of the application by the agent or attorney realistically calls for clerical activity or paper work, at most, at the Chicago office and does not in any event constitute the contract of insurance.

An illustration of the formal and incidental character of this clerical step can be found in the admission of appellants' witness that insurance engineers perform services within the State of New York essential to effect a binding agreement between the New York resident and the other subscribers. To guarantee the soundness of their plans and develop the low loss ratios of which they boast,

appellants concededly and necessarily depend to a great extent upon the accuracy of their "engineers'" appraisals and investigations made at the locus of the property insured. As a practical matter the stamp of approval that substantially determines whether a prospect will be acceptable is that of the engineer who surveys the former's business and properties on the spot. Furthermore, appellants tell us that the amount of the deposit required of subscribers (corresponding to a premium charge) is "determined by the agent, taking into consideration the factors of risk and size and things of that kind" (R. 35, 60). Here again personal investigations of the engineers, clearly involving presence and activity in New York State in the case of applicants resident here, play an important part in the transaction of appellants' insurance business. It is not a mail-order, shipped-direct-from-Chicago business, but is rather custom-made and adjusted on the scene to fit the customer's needs.

In adjudicating cases involving activities of insurance companies outside of the state of their creation this Court has paid close attention to matters of *performance* of the policy, looking beyond the act of executing the insurance contract. In a leading case on the question of "doing business", *Pennsylvania Lumbermen's Mutual Fire Insurance Co. v. Meyer*, 197 U. S. 407 (1905) this Court noted the practice of the Company of sending its agents into the State of New York when a loss by fire occurred there to property insured by it, for the purpose of adjusting the amount of the loss. All other negotiations were by mail. The Court made these observations at 197 U. S., pages 414-415:

> "Was the company doing business in New York State? Nearly one-third of the amount of its total fire risks was in that State when these policies were

> issued and when the loss occurred. If it be conceded that the contract was made in Philadelphia, it does not follow that all its business was therefore done in the State of Pennsylvania. * * * A fire insurance company which issues its policies upon real estate and personal property situated in another State is as much engaged in its business when its agents are there under its authority adjusting the losses covered by its policies as it is when engaged in making contracts to take such risks. * * * We think it would be somewhat difficult for the defendant to describe what it was doing in New York, if it was not doing business therein, when sending its agents into that State to perform the various acts of adjustment provided for by its contracts and made necessary to carry them out."

See also *Commercial Mutual Accident Co. v. Davis,* 213 U. S. 245 (1909).

In the case at bar the insurance "engineers" of the appellant reciprocals are sent to the scene of the ruins where a substantial loss has been suffered to examine the property, appraise the damage, investigate the cause of fires, and perform similar services which cannot be accomplished at long range.

When we speak of "adjustment" of losses, we do not have reference alone to the final decision as to the amounts to be paid the assureds or the act of mailing the check to cover the obligation under the policy; we refer to the sum of the acts necessary to arrive at the ultimate figure. And the activities of the inspectors of appellants in this State in this connection are certainly a necessary part of that process. Similarly the courts, emphasizing "adjustment" activities, appear to use the word in its larger sense. Appellants dismiss these acts of its inspectors as being entirely without significance by alleging they are not "affirmative" acts (R. 68). Without puzzling over their defini-

tion of "affirmative", we submit that these activities, however characterized, shed much light on appellants' local transactions.

The insurance "engineers" work with subscribers to see that fire walls, sprinkler systems, or other such devices are put in if necessary to qualify the prospect or reduce the possibilities of loss of properties already insured. In the words of appellants' own Counsel:

> "These field representatives, these trained engineers, do nothing but service these contracts, and if any one in the vicinity wants one of these representatives to come and look at his property to see if he can qualify, why, naturally a field representative will go and survey it." (R. 56.)

Mr. Justice Frankfurter of this Court noted in *Osborn v. Ozlin*, 310 U. S. 53, (1940):

> "A policy * * * must be 'serviced'—an insurance term for assistance rendered a customer in minimizing his risks. * * * Only to a limited extent can risks be minimized at long range; local activity is essential."

And compare *Bothwell v. Buckbee, Mears Co.*, 275 U. S. 274, 278 (1927).

Even before the insurance policies of New York subscribers in appellants' companies become effective these same "engineers" have tasks to perform in this State. An "engineer" calls upon a recommended prospect and investigates his properties. To investigate what appellants term the prospect's "moral hazard" the "engineer" is compelled to look at the various "housekeeping" habits of the prospect at the plant to be insured. The layout, structure, surrounding conditions and other physical characteristics are closely studied.

The fact that the insurance "engineers" are in personal contact with applicants or prospects may have had something to do with the popularity and expansion of appellants' insurance plans. Another contributing factor, described in the record by appellants themselves, is the use of the device of "recommendation" by existing or present subscribers as a means of bringing new customers into the exchanges. This method of selling insurance is, in a realistic sense of the word, "solicitation", and when performed by New York subscribers (assureds-insurers), it takes place *in this State*. Appellants insist upon clinging to the traditional notion of "solicitation" which they allege is a prerequisite to the finding of "doing business". Their concept would require the services of agents, labelled "solicitors", who must be traced canvassing from house to house, or pursuing usual channels of trade in the State looking for prospects. They refuse to admit, before the courts at least, the effectiveness of modern, more subtle methods of doing business, such as the device of *intra-mural* "recommendation".

We have shown in our statement of facts the volume of the appellants' risks in New York in relation to those of domestic reciprocals and to their own coverage in other States, as well as the steady growth of the business pertaining to New York over a period of years. Clearly, these figures indicate no sporadic or isolated transactions but a continuous, large and growing volume of business conducted with all the essential local aspects hereinbefore discussed, resulting in engagements by and for the protection of New York residents with respect to property in that State of great value.

This Court consistently stresses the importance of measuring the volume and frequency of the local transac-

tions in determining whether business is being done in a State.

Pennsylvania Lumbermen's Insurance Co. v. Meyer, 197 U. S. 407, 414-415;
International Harvester Co. v. Kentucky, 234 U. S. 579, 585-6.

In reliance upon the doctrine of the *Allgeyer* case, appellants have attempted to read out of this case all consideration of the location of the property insured, within the boundaries of the State which has applied its regulatory measures to the insurance plan through which it is sought to protect that property. But if location of risk alone does not give jurisdiction, it does not follow that it is not an important factor, when allied with local activity in the making and performance of insurance contracts, in determining the extent and nature of the State's protective power. A distinction may be observed between *ambulatory* insurance, such as life and casualty, and that on physical property located permanently within a State (cf. *Minnesota Commercial Men's Association v. Benn*, 261 U. S. 140). Obviously, in its exercise of power to "set the standard of security" for insurance within its borders (*Firemen's Insurance Co. v. Beha*, 30 Fed. [2d] 539, 542, aff'd 278 U. S. 580) the State's paramount concern is with the extent and quality of the protection given to property against the hazards of loss and disaster which can only occur within its borders. Such protection is essentially of primary local concern, much more real than that which has to do only with the formal act of binding a contract which may be done anywhere.

Allgeyer v. Louisiana, 165 U. S. 578, in so far at least as it is invoked to prevent a State seeking to extend its

regulatory power to insurance upon property within its boundaries and enjoying its protection, is of much diminished authority (*Osborn v. Ozlin*, 310 U. S. 53, 66). Its force is limited to those instances where an individual seeks, apart from local transactions, to exercise his freedom of contract to procure insurance for himself solely as an insured, or where the State seeks too broadly to reach any insurance so procured covering a local risk, as in *Fidelity & Deposit Co. v. Tafoya*, 270 U. S. 426, but where insurers "have subjected themselves to local control" and the insurance of local risks is produced and serviced through local activities, the State has a "definable" and legitimate interest supporting regulatory measures not affected by the execution of the contract elsewhere (*Osborn v. Ozlin*, 310 U. S. 53).

Appellants' elaborate attempt to distinguish the *Osborn* case but emphasizes its application to the case at bar. It takes the form of asserting that the contracts involved were Virginia contracts because countersigned by Virginia agents although the Court did not rest its holding on any such finding and refused to judge the legislation by "abstracting an isolated contract written in New York" expressly holding that Virginia "had not sought to prohibit the making of contracts beyond her borders", but was claiming merely "that her interest in the risks which these contracts are designed to prevent" warranted the control imposed (pp. 62, 63). A further distinction is sought to be noted in activities found to constitute the doing of business in Virginia. These related to the production and servicing of insurance on Virginia risks and differ insubstantially from analogous activity in New York in connection with the insurance plan herein at issue. The *Osborn* case did not represent an attempt to bring the formal execution

of the contract within the borders of Virginia or to base a regulation on that factor. The measure therein concerned was designed to assure the active use of resident agents for the local activities of procuring and servicing policies covering Virginia risks in the transaction of insurance business in that State and thus to give to its own residents a "share in devising and safeguarding protection against its local hazards".

4. *Appellants may not retain a license authorizing the transaction of business in New York for a limited or special purpose free from any control by the State of their local activities.*

Appellants have sought and obtained authority to transact business in New York and are admittedly anxious to retain it and the advantages deriving therefrom. It would seem logically to follow that they have subjected themselves to local control; yet they vigorously assert their immunity from any enforcement whatever of the restrictive regulations which condition such a license (Insurance Law, §§ 42(5), 411, 414(2) and 422(1).

Such claim is not made only in respect to some portion of the business asserted to be carried on beyond the local interest of New York, but to the entire course of appellants' business, both within and without the State. It presents the anomalous spectacle of insistence upon a license from a State in which no business is admitted to be done and the regulatory interest of which is denied. The authorization itself reenforces jurisdiction as to local aspects of the licensees' activities (*Osborn v. Ozlin*, 310 U. S. 53; *Equitable Life Society v. Pennsylvania*, 238 U. S. 143; *Compania de Tabacos v. Collector*, 275 U. S. 87).

No possible view of constitutional right supports appellants' claim that they may secure or retain a license from the State for purposes of their own, apart from the conduct of business therein. If the license has value to them it must be inevitably derived from business activities in proposing to make and effectuate contracts of insurance within the State. In that event they may have the license only with the conditions of its exercise annexed. If no such activities were, in fact, engaged in the license would be but a false seal of approval which the State could not be compelled to keep in force with respect to an insurance business not falling within its local concerns.

Appellants protest that the Court of Appeals misconceived their argument in stating that they contend that although authorized, they seek to be treated as though they were not (R. 198, Brief, p. 26). This is, nevertheless, the necessary effect of the argument. They have no right to freedom from regulations if transacting business in the State of New York and no right to a license if not transacting such business.

Looking past appellants' concededly zealous attempt to withdraw their insurance operations from the control of other states by a concentration of the documentary and administrative features in Illinois, and viewing them as an "organic whole" there is abundant support for the finding of the courts below that they are carrying on their business in the State of New York and subject to its regulatory jurisdiction.

POINT II.

The assailed provisions of the Insurance Law do not invalidly extend beyond the borders of the State of New York to matters which are no part of its local concern. They are each a reasonable and valid regulation of business within the legitimate interests of the State.

A. The statutes have no invalid extraterritorial effect.

Appellants' claim of invalid extraterritorial operation for the regulations assailed presents no issue of wisdom nor even of whether matters outside the State may be affected, but only a narrow one of power (*Osborn vs. Ozlin*, 310 U. U. 53, 62). The inquiry is only whether the State has "taken hold" of a matter affecting its local concerns. "Incidental repercussions" beyond its borders cannot curtail the power to deal with its own affairs.

Incorporation or organization in some other state and the spread of business and activities over other states cannot control or nullify the public policy of the state with respect to business done within its borders (*Atlantic & Pacific Tea Company vs. Grosjean*, 301 U. S. 402).

The preceding discussion of the essential and extensive local activities of appellants sustains, we believe, the interest and power of New York to devise measures for safeguarding such insurance against local hazards and it need not stay its hand because the system extends into other states and the effect of the regulation may be felt in its general operation. New York's interest in the regulation of business done locally is not delegated by the Constitution to the State of Illinois, nor to any other state wherein

some features of that business may be consummated, nor does appellants' desire for uniformity of contracts gain them immunity from local regulation.

The policy of standardizing contracts nationally may have merit from the isolated viewpoint of business expediency. But the paramount interests of the state will not be denied by the Federal Constitution merely because they conflict with the contract provisions dictated from the home office. *Modern Woodmen vs. Mixer*, 267 U. S. 544, 551 (1925), *Royal Arcanum vs. Green*, 237 U. S. 531 (1915), and *Boseman vs. Connecticut General Life Insurance Co.*, 301 U. S. 196 (1937), cited by appellants at pages 17 and 18 of their Brief, do not establish any constitutional principle to the contrary. Those cases did not raise questions of the validity of statutes of the forum announcing a public policy to be followed with respect to business done locally. To borrow from appellants' terminology, the "door" has always been "opened to all manner of conflicting regulations" by the states with respect to insurance business. Appellants must seek comfort in uniform state legislation, rather than in the Federal Constitution.

Allgeyer vs. Louisiana, 165 U. S. 578, must be confined, as heretofore urged, to attempts to penalize an insured seeking to contract beyond local borders and without local activity by the insurer. Even the implications flowing from that holding have been cast in doubt (*Osborn vs. Ozlin*, 310 U. S. 53, 66) and it throws no obstacle in the way of regulation by a state of foreign insurers engaged in the insurance of local risks surrounded by substantial degree and character of local activity.

Here the state regulation is not directed at matters outside its territory nor does it palpably attempt to bring

within state jurisdiction any transaction or relationship not connected with local interests. The regulations in question are directed only to authorized foreign reciprocal insurers doing business in the State of New York and applies to them the same restrictions which govern domestic exchanges (Insurance Law, §§ 411, 412, 422). If such regulations were invalid because exerting an effect upon insurers' operations elsewhere, then any regulation of a foreign insurer, such as of its financial condition, which could not be complied with wholly in New York would be equally void. The indirect effect elsewhere would countervail direct regulation for legitimate local purposes, "an intolerable limitation" *(Firemen's Insurance Company vs. Beha,* 30 Fed. (2nd) 539, affirmed 278 U. S. 580). It is not of itself an objection to the exercise of otherwise legitimate state power that its effect may be transmitted through integrated activities out of which the state's interest arises.

Appellants can hope for little support on this issue from cases arising out of a particular insurance policy, in which the public policy of the state (usually of the forum) is drawn in issue indirectly. In such cases the court's sole concern may be the circumstances surrounding the particular insurance contract rather than the company's entire organic course of business within the state. This Court has accordingly held the state enactment to be invalidly applied where "nothing in any way relating to the policy sued on has ever been done in the State of the forum" *(Home Insurance Co. v. Dick,* 281 U. S. 397, 408, 1930); or that "the interest of the forum has but slight connection with the substance of the contract obligations." *(Hartford Indemnity Co. v. Delta & Pine Land Co.,* 292 U. S. 143, 150, 1934.) In *New York Life Insurance Co. v.*

Head, 234 U. S. 149 (1914) the insured, covered by a life policy, was not even a resident of the State of the forum, and the transaction in issue was a loan taking place in the State of New York. The Missouri statute could not be validly made to govern that transaction; but the same statute was upheld when applied to a loan upon a policy issued to a Missouri resident in *New York Life Insurance Co. v. Cravens*, 178 U. S. 389.

B. The particular regulations attacked are reasonable and valid.

Upon judicial scrutiny of the validity of the statutory regulations herein, full scope must be allowed to the play of legislative judgment in determining policy and the needs of the public welfare. It is fundamental that such determinations will not be overturned unless patently unrelated to the public purpose at hand, or so arbitrary as to exceed the bounds of due process *(LaTourette vs. McMaster*, 248 U. S. 465, 467).

The statutes here in question must be weighed as general expressions of the state's concern with the safe and faithful conduct of insurance. The discussion of them which follows is predicated upon the finding, supported by the record and the authorities alike, that appellants are engaged in the business of insurance within the State of New York.

Section 412 (1)

Appellants' objection to this provision is that it is an unlawful discrimination to restrict new subscribers to those who have met assets of not less than $10,000.00. It is contended that it is a standard based on a "man's mere

property status". It is not, however, by any means, a social or property test applied to some right of citizenship. The requirement is clearly related to the ability of subscribers to bear the obligations assumed in a reciprocal insurance plan to the end that the financial stability thereof be assured. In safeguarding the financial structure of companies in which every assured is an insurer, it is not unreasonable to impose more rigid requirements than in the case of stock or mutual company policy holders.

Viewed in this light, the Legislature cannot be said to have arbitrarily exercised its judgment in respect to the standard fixed. Present members of the Exchanges herein need but to comply with Section 418 requiring the maintenance of an operating reserve in order to qualify for renewal contracts. Appellants' business will not be disrupted by the regulation.

Section 417 (1)

This section requires the inclusion in any subscriber's contract of a provision "for a contingent several liability for assessment of the subscriber as an inter-insurer on the risks of every other subscriber in an amount not less than one nor more than ten times the amount of and in addition to the annual premium expressed in such contracts of insurance issued to the subscriber by the reciprocal insurer".

It is difficult to follow appellants' argument that unlimited liability is essential to the operation of their plan of insurance and that the limitation imposed by the section would destroy it. That it is termed a "contingent" liability has no effect. The whole liability assumed is contingent upon the amount of losses and expenses.

Subdivision 2 of the statute gives the key to when the occasion for such assessments may arise by providing therefor when assets are "insufficient for payment of losses and expenses" and to satisfy other named liabilities.

No constitutional obstacle readily appears to prevent giving effect to the legislative judgment that it is wise to impose such a limitation upon what could otherwise conceivably be a crushing and ruinous burden upon businessmen so underwriting each other's losses. That limitation safeguarding the individual subscriber is accompanied by the requirement of a special contingent fund under Section 413 (2) protected from impairment by dividends or refunds, such as the "savings" of appellants, or by withdrawals of retiring subscribers, looking to the general stability of the plan and lessening the probability of assessments. Nor does any tenable objection inhere in the absence of or different limitations under other types of insurance.

Appellants assert the economy of their plan of insurance and insist that their annual deposits have been sufficient to return a dividend or "savings" to the subscribers. This would appear to make the limitation of Section 417 (1) an entirely academic one as to them, until such time as such assessments may have to be imposed when the protection of the statute will inure to the benefit of the individual subscribers. The regulation in no way interferes with or arbitrarily alters the normal working of the plan or liability of the subscribers.

The argument that there is no premium under the reciprocal plan calls for a word as to appellants' attempt to find constitutional objection by confusion of terms. The

use of the single term common in insurance terminology as a measure of convenience for annual statement purposes, for tax purposes (Insurance Law §550(1), 552(5b)) and in the administration of the rating laws of the State (Insurance Law, Art. VIII) has been legitimately prescribed and has posed no difficulty. The deposit made under such plan is calculated on the basis of coverage and character of risk, in accordance with the probably cost of the insurance and is obtained in advance, making necessary the returns by way of dividends, refunds or returns of "deposits" (413(2)) or "savings" as appellants term them. Presumably, the limitation will motivate careful determination of such deposits. The application to them of the terms "premium" or "premium deposit" furnishes no ground for holding unconstitutional the statute in which they are employed. The highest court of the State has affirmed such usage in respect of appellants' practice.

Section 418 (1)
Section 418 (3)

Appellants' chief objection to Section 418 (1) appears to be that it requires the building up of operating reserves for each subscriber larger than is the present practice or than they yet have had need for. Appellants recognize the need and desirability of this type of surplus, for their present practice is to accumulate such a reserve out of the "savings" to subscribers after the deduction of losses and expenses. The argument that the amount of such reserves is too high is one to be addressed to legislative judgment and policy. It does not appear to be so far beyond the needs of safeguarding the ability of reciprocal insurers to meet their obligations or beyond appellants' existing methods as to be an arbitrary and impossible burden.

Again, the quibble over the use of the term "earnings as an underwriter" has no constitutional significance. Obviously, it refers to the "savings" on the unabsorbed portion of premium "deposits" and is clearly understandable in relation to them. The Legislature was not required to adopt the individual nomenclature of various insurers. The accumulation can derive only from the actual "earned" surplus, and can only operate to strengthen the reciprocal by building up a surplus for the protection of the individual subscriber who may have loss claims.

That Section 418 (3) places some restrictions on the theory that subscribers have complete title to their several accounts by dedicating the reserve first to payment of claims of policyholders and creditors of the reciprocal does not invalidate the requirement. The subscriber may withdraw such accumulations upon retirement from the plan but subject to such claims. Obviously, a participant in reciprocal insurance has no right to demand the return of accumulations as his absolute property held in a mere depositary free from the very obligation for which they are required to be reserved. The regulation prescribes a general standard for the safe conduct of direct inter-insurance. Clearly, it imposes no unrelated or oppressive burden, nor does the absence of such a requirement with respect to insurance companies, whose policyholders are not likewise direct insurers, constitute a ground for striking down the legislation.

Section 130
Section 422 (1)

Section 130 prohibits any licensed foreign insurer from issuing, delivering or otherwise effectuating a contract of insurance in the State of New York except through a resi-

dent licensed insurance agent of the State or countersigned by such an agent. Appellants' objection admittedly derives mainly from their contention that New York has no jurisdiction over any of their activities. The Court of Appeals has held the statute applicable to plaintiffs since they are doing business in New York State and thus effectuating their contracts therein. The meaning of the statute has been settled by that Court's decision. The propriety of such a provision and the power of the State to impose it are within the controlling authority of *Osborn v. Ozlin*, 310 U. S. 53, which we have heretofore examined on the basic issue of jurisdiction. The Legislature may well have believed that the use of a resident agent would benefit those who seek insurance protection under the reciprocal plan as well as further the State's supervision and control over the conduct of the insurer within its borders with respect to the property of its citizens.

The same considerations apply equally to the requirement that an office be maintained in the State. No reason appears why any of the representatives termed "engineers" by appellants could not meet the qualifications and be licensed as an agent. These representatives perform the functions incidental to the procuring, service and performance of the contract which the statute aims to bring into the hands of residents. Nothing indicates that the State's sole aim is to secure commissions for local residents, nor does Section 110 (3) fasten a commission system of compensation upon the use of such agents.

Section 168 (2)

This is the statute prescribing for use in New York State a standard form of fire insurance contract. Appellants ad-

dress their argument in this Court to its provisions as amended by Chapter 900 of the Laws of 1942, effective July 1, 1943, contending that it carries forward the objectionable features of the present statute. The objection is primarily to the requirement that a premium be stated and generally that they cannot "conform in all particulars" to the form prescribed "without completely destroying the plan of insurance." No specific objections are addressed to the stipulations of the contract form designed to make uniform and exact the basic rights and duties of the parties thereunder and the coverage extended thereby.

What we have previously said concerning terminology is pertinent here. Subdivision 2 permits reciprocal insurers to include regulations appropriate to or required by their form of organization. Thus, their policies may state clearly just what the consideration for their insurance is. The contract provision obviously relates to what appellants term "deposits." The definition of "premium", given in relation to taxation provisions (Sec. 550 (1)) as including "premium deposits", gives clear indication that the Legislature has used the term broadly and with knowledge of its varying applications. No prejudice to appellants appears from the necessity of using the term "premiums" in their policy. The deposit is intended to cover the cost of the insurance with a possibility of a refund or additional expenses to be determined on the basis thereof. It does not alter the reciprocal nature of the insurance or preclude the inclusion of the full provisions relating thereto.

The amended statute in subdivision 6 contains express permission to substitute any more accurate descriptive term for the word "company" in the policy.

Section 410 (1)
Section 415 (1d)

These sections deal with the powers of the advisory committee and its manner of election. Section 410 (1) refers to an advisory committee chosen by the subscribers having ultimate power and responsibility "subject to the articles of association and subscribers' agreement". It must be read in connection with Section 415 (1e) which requires specification in the subscribers' agreement of the powers of the advisory committee, including the power to regulate the powers and duties of the attorney in fact "if not specifically provided in the subscribers' agreement". No objection can be seen to giving the subscribers, who are the real insurers, power to prescribe the authority of their governing committee and, through such committee or directly, that of their attorney in fact.

Clearly, also, there can be no objection to a provision reasonably designed to insure full opportunity to have a voice in an annual election of members of the advisory committee.

Section 415 (1)

The requirement as to the execution of the power of attorney is obviously designed to avoid question as to its validity and difficulties of proof should a subscriber need to bring action in the assertion of his rights. It has a clearly apparent relation to assuring the individual subscriber the means of enforcing the obligations of those with whom he contracts for insurance coverage.

Section 413 (2)

The special contingent surplus provided by Section 413 (2) is a proper requirement for a minimum reserve protected from impairment by dividends, refunds or withdrawals. Its real purpose and effect is to require the maintenance of a reserve which cannot be depleted by wholesale withdrawal of subscribers and the funds included in their operating reserves. It insures to the reciprocal as a going concern a limited but certain and protected fund safe from depletion and is a proper protective measure.

Conclusion.

Appellants' activities in the State of New York and their authorization to do business therein under its statutes, have brought them within the orbit of the State's protective jurisdiction with respect to its local interests. The applicable regulations are reasonable and do not exceed the bounds of the State's lawful concern. The judgment of the Court of Appeals should be, in all respects, affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 358.—October Term, 1942.

Hoopeston Canning Co., E. Pritchard, Inc., et al., Appellants, *vs.* Thomas J. Cullen, Superintendent of Insurance of the State of New York, et al. } On Appeal from the Supreme Court of the State of New York, Albany County.

[March 1, 1943.]

Mr. Justice Black delivered the opinion of the Court.

The New York Insurance Law (Cons. Laws, ch. 28), as amended in 1939, provides a comprehensive and detailed plan for regulation of all types of insurance and insurance companies "doing an insurance business" (§ 41) in that state. Article 12, applicable to reciprocal insurance associations, defines them as aggregations of persons, firms, or corporations, who under a common name engage in the business of exchanging contracts of insurance on the reciprocal plan through an attorney in fact.[1]

The issue in this case is whether the appellants, reciprocal insurance associations which insure against fire and related risks and whose attorneys in fact are located in Illinois, may constitutionally be made subject to the laws of New York as a condition of insuring property in that state. The New York Law, § 422, requires that these cooperative insurance associations must obtain a license or be prohibited from doing "any act which effects, aids or promotes the doing of an insurance business" in New York, § 410(2). As a condition of the license, submission to the New

[1] Inter-insurance, or reciprocal insurance, has been described as "that system of insurance whereby several individuals, partnerships and corporations underwrite each other's risks against loss by fire or other hazard, through an attorney in fact, common to all, under an agreement that each underwriter act separately and severally, and not jointly with each other." 58 Central L. J. 323. The nature of the business of these particular reciprocals is fully discussed in the opinion of the court below and is described to some extent in this opinion. The opinion of the trial court is reported at 25 N. Y. Supp. 2d 312; the opinion of the Appellate Division is reported at 262 App. Div. 446; and the opinion of the Court of Appeals is reported at 288 N. Y. 291. For a general discussion of the nature of inter-insurers and some of their legal problems, see 94 A. L. R. 836.

York regulations is required. The appellants contend that the law as applied to them violates the due process and equal protection clauses of the Fourteenth Amendment. They raised these questions appropriately in a declaratory judgment action in New York state courts, the Court of Appeals upheld the law, and the case is here on appeal under § 237(a) of the Judicial Code.

These reciprocals have been annually licensed to do business in New York since 1930 and allege that they are "desirous of qualifying under the valid provisions of the Insurance Law of 1939, and of securing a license thereunder." More than 50,000 contracts affecting New York state risks have been executed since the reciprocals began business, and the gross payments made by New York concerns as premiums or deposits amounted to more than $2,000,000 for the period from 1931 to 1938. The total of premiums or deposits from insurance affecting New York property is more than that from Illinois, the state in which the associations have their headquarters and whose laws they insist must govern their contracts.

Two principal contentions are urged against the constitutionality of the New York law as applied to these reciprocals: (a) Since the contracts of insurance are signed in Illinois and losses are paid by checks mailed from that state, the associations do no business in New York which therefore has no power to regulate them. (b) Assuming that New York does have general power to regulate, nevertheless certain of the provisions of the statute do not accord with due process and deny equal protection of the law.

First. Business in New York. Assuming that the formalities of contract are carried on in Illinois, the issue remains whether the insurance enterprise as a whole so affects New York interests as to give New York the power it claims.

In determining the power of a state to apply its own regulatory laws to insurance business activities, the question in earlier cases became involved by conceptualistic discussion of theories of the place of contracting or of performance.[2] More recently it has been recognized that a state may have substantial interests in the business of insurance of its people or property regardless of these isolated factors. This interest may be measured by highly realistic considerations such as the protection of the citizen

[2] Allgeyer v. Louisiana, 165 U. S. 578, 587. See, A Factual Approach to the Constitutional Law Aspect of the Conflict of Laws, 35 Col. L. R. 751. Cf. Frene v. Louisville Cement Co., — F. 2d —.

insured or the protection of the state from the incidents of loss. *Alaska Packers Association* v. *Industrial Accident Commission*, 294 U. S. 532, 542. To insure the protection of state interests it is now recognized that a state may not be required to enforce in its own courts the terms of an insurance policy normally subject to the law of another state where such enforcement will conflict with the public policy of the state of the forum. *Griffin* v. *McCoach*, 313 U. S. 498.[3]

The actual physical signing of contracts may be only one element in a broad range of business activities. Business may be done in a state although those doing the business are scrupulously careful to see that not a single contract is ever signed within that state's boundaries.[4] Important as the execution of written contracts may be, it is ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.

The facts of the instant case give clear proof of these statements. The contracts are made in this way: A canner or wholesale grocer in New York signs an application to become a "subscriber". This is sent to the attorney in fact at the head office in Chicago. One of a group of insurance engineers may be sent to New York to investigate the risk, and if accepted, the applicant signs a power of attorney and sends it and the application back to the attorney in fact. The attorney in fact then issues a policy of inter-insurance which is mailed to the subscriber in New York, and the subscriber thus becomes the insurer and the insured. The insurance engineers may visit the subscriber from time to time to encourage the reduction of fire hazards or to investigate the cause and extent of losses, and on such trips the engineer may give information concerning the enterprise to prospective participants, although he does not actively solicit business. The contracts reserved the right of the reciprocals to go into New

[3] This rule was not applied where the state had no actual contact with the insurance contract; i. e., where neither the original insured nor the company were residents of the state, the property insured was elsewhere, and the contract was made elsewhere. Home Insurance Co. v. Dick, 281 U. S. 397. Cf. Kryger v. Wilson, 242 U. S. 171, where, under similar circumstances, a state was entitled to apply its own law in a non-insurance situation where the property which was the subject of the litigation was within its bounds.

[4] International Harvester v. Kentucky, 234 U. S. 579. For an example of the refusal of a court to permit evasion of the law of a state by a contract made just over its borders, see Ocean A. & G. Corp. v. Industrial Commission, 32 Arizona 275, 285.

York to repair, rebuild, or replace lost or damaged property. Cf. *Lumbermen's Insurance Co.* v. *Meyer*, 197 U. S. 407, 417. Surely the object of all this activity is not the signing of a contract or a check, but the protection of property and payment of indemnity in case of loss by fire. These business transactions neither begin nor end with the contract.

The intimacy of the relation of these insurance contracts to the state of New York becomes even more apparent when it is remembered that the property insured is in the state of New York. The states have long held great authority over property within their borders. A state may make flood control, quarantine, conservation and zoning regulations affecting property within its bounds. It is the source of law for the forms of conveyances, for the nature of covenants, future interests and easements, for the construction of wills, trusts, and mortgages, and for many other legal principles affecting property interests. Contracts formally made in other states may remain subject to the law of the state of the situs of the property, particularly in respect to immovables.[5] There is no more reason to bar the state from authority over the insurance of the property within it than to exclude it from control of all the other property interests mentioned.

The appellants draw counter conclusions from *Allgeyer* v. *Louisiana*, 165 U. S. 578, and the cases which follow it. While the wisdom of the *Allgeyer* case has occasionally been doubted, it is in any case clearly distinguishable here. In that case, no act was done in the state of Louisiana except that of mailing a letter advising the insurance company of a shipment of goods, the goods themselves were in the state only temporarily, and the insurance company never purported to do business in the state. In the instant case, the reciprocals have the many actual contacts with the New York subscribers and the New York property outlined above, much of the insurance covers permanent immovables, and the reciprocals have been licensed to do business there for years. The *Allgeyer* and subsequent insurance cases have been recently considered in *Griffin* v. *McCoach*, *supra*, at 506, 507 and in *Osborn*

[5] Carpenter *v.* Strange, 141 U. S. 87, 106; Watkins *v.* Holman, 16 Pet. 25, 57; Fall *v.* Eastin, 215 U. S. 1, 9, 12; *cf.* Union Transit Co. *v.* Kentucky, 199 U. S. 194; Curry *v.* McCanless, 307 U. S. 357, 363; Graves *v.* Elliott, 307 U. S. 383. For a discussion of this subject, see Cook, 'Immovables' and the 'Situs', 52 Harvard L. Rev. 1246.

v. *Ozlin,* 301 U. S. 53, 66; as the analysis in those opinions clearly indicates, the *Allgeyer* line of decisions cannot be permitted to control cases such as this, where the public policy of the state is clear, the insured interest is located in the state, and there are many points of contact between the insurer and the property in the state.

We conclude that in determining whether insurance business is done within a state for the purpose of deciding whether a state has power to regulate the business, considerations of the location of activity prior and subsequent to the making of the contract, *Osborn* v. *Ozlin, supra,* of the degree of interest of the regulating state in the object insured, and of the location of the property insured are separately and collectively of great weight. Applying any of these tests, it is apparent that the reciprocals are doing business in New York and are thereby subject to regulation by that state.

Second. Validity of the Regulations. The assailed requirements are in substance these.[6] Reciprocals' subscribers in every state must execute their powers of attorney in accordance with specified forms and a standard form of contract must be used by all subscribers wherever they are located. Certain forms of accounting are also required. Advisory committees of the subscribers themselves, rather than appointed attorneys in fact, must have ultimate powers of management of the reciprocals' affairs and must provide regulations for the control and custody of their funds. The advisory committee must be elected at an annual meeting of the suscribers, held after notice to them, where they can be present either in person or by proxy. Provision must be made for stipulated operating reserves for payment of losses, for a contingent liability of subscribers of not less than one nor more than ten times the amount of the annual premium expressed in the contract, and for a surplus to be maintained unimpaired. No subscriber is to be granted a secured or preferred claim against the operating reserve. No new agreements are to be made with subscribers who do not have net assets in excess of ten thousand dollars. At least one office must be maintained in New York and policies must be countersigned by a resident New York agent.

These regulations can not be attacked merely because they

[6] The sections of the Insurance Law which appellants contend are invalid are Sections 130, 168(2), 401(1), 412(1), 413(2), 415(1), 417(1), 418(1)(3), 420, 421, and 422(1).

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affect business activities which are carried on outside the state. Of necessity, any regulations affecting the solvency of those doing an insurance business in a state must have some effect on business practices of the same company outside the state. Nothing in the Constitution requires a state to nullify its own protective standards because an enterprise regulated has its headquarters elsewhere. The power New York may exercise to regulate domestic insurance associations may be applied to foreign associations which New York permits to conduct the same kind of business. The appellants can not, "by spreading their business and activities over other states . . . set at naught the public policy" of New York, *Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U. S. 412, 427. Where as here the state has full power to prescribe the forms of contract, the terms of protection of the insured, and the type of reserve funds needed, "the mere fact that state action may have repercussions beyond state lines is of no judicial significance." *Osborn* v. *Ozlin, supra*, at 62. Neither New York nor Illinois loses the power to protect the interests of its citizens because these associations carry on activities in both places. *Alaska Packers Association* v. *Industrial Accident Commission, supra.* We think the regulations themselves, since they are aimed at the protection of the solvency of the reciprocals or at promoting the convenience with which New York residents may do their insurance business, are all within the scope of state power. *Osborn* v. *Ozlin, supra*, at 65, 66.

It is argued that the provision requiring each new subscriber to have net assets of $10,000 violates the equal protection clause, but since each subscriber is also an insurer and other subscribers are dependent on his financial responsibility, there is no reason why the legislature might not think this provision necessary. It is also complained that different requirements have been put upon reciprocals than mutual companies; but we have previously held that a co-operative insurance company may be subject to separate classification for the purpose of determining how it shall be regulated. *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 418. Cf. *Tigner* v. *Texas*, 310 U. S. 141. The provisions requiring an office in the state and counter signature of the contracts by an agent in the state are no more stringent than those approved in *La Tourette* v. *McMaster*, 248 U. S. 465.

The appellants earnestly insist that their's is a successful system of co-operative insurance which gives complete security with

substantial economy to their members, and that their New York subscribers may lose the benefits of this form of insurance by reason of the reciprocals' inability to comply with the requirements of the New York law. That the reciprocals save for their members from 25 to 50 per cent of the cost of ordinary commercial insurance and that the members are well satisfied with the system they have created is not controverted by counsel for the state of New York. However persuasive such arguments might be if addressed to the state legislature, they present no constitutional barrier which prevents New York from enforcing these regulations if it chooses.

Affirmed.

The CHIEF Justice and Mr. Justice JACKSON concur in the result.

Mr. Justice RUTLEDGE took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.